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SUPREME COURT OF THE UNITED STATES.

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OCTOBER TERM, 1900.

174

THE KNOXVILLE IRON COMPANY, Plaintiff in Error,

vs.

SAMUEL HARBISON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF FOR PLAINTIFF IN ERROR.

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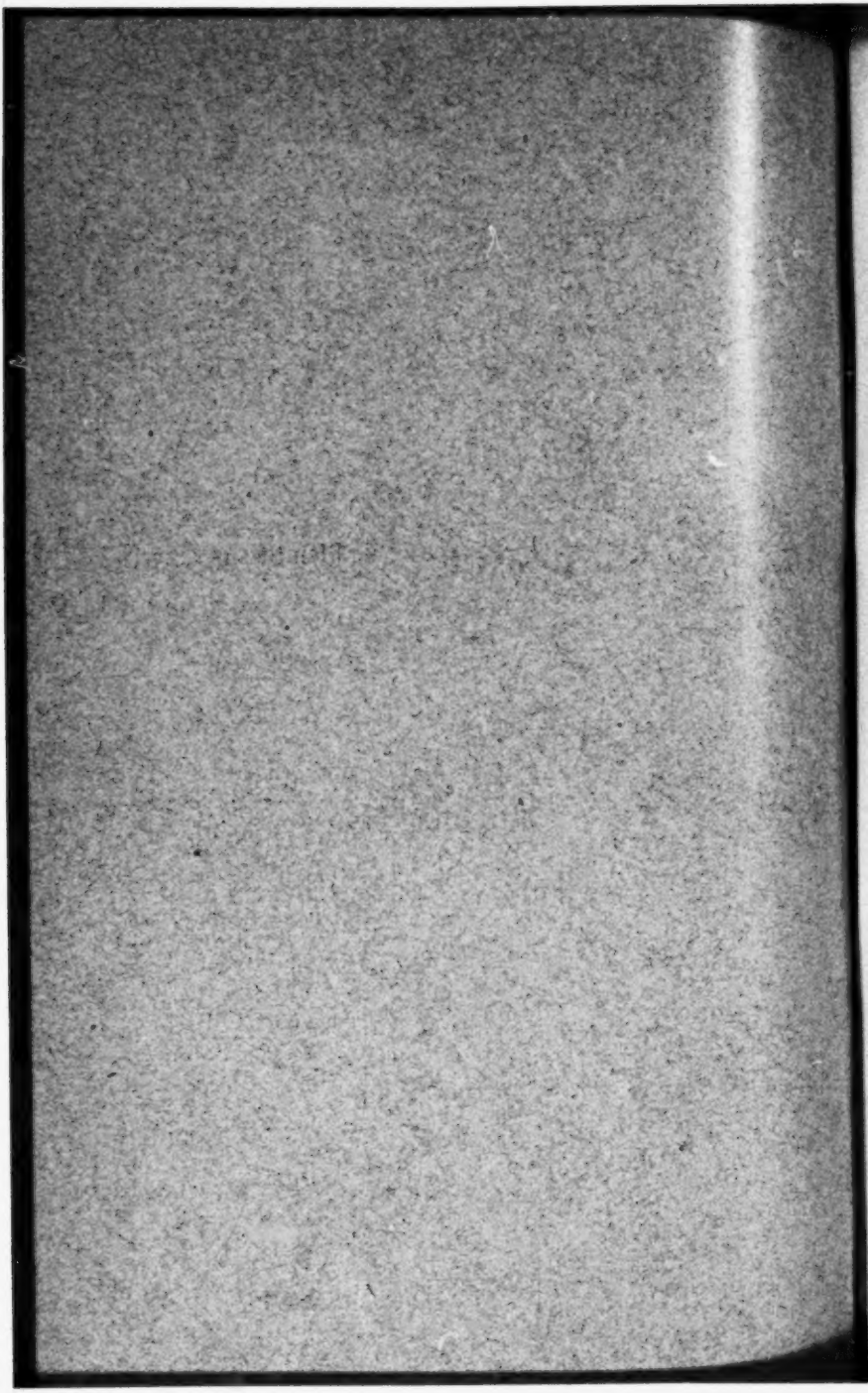

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 174.

THE KNOXVILLE IRON COMPANY, Plaintiff in Error,

vs.

SAMUEL HARBISON, Defendant in Error.

In Error to the Supreme Court of the State of Tennessee.

STATEMENT OF THE CASE.

This is a suit in equity brought to this Court by a writ of error to the Supreme Court of the State of Tennessee, involving the constitutionality of an Act of the Legislature of Tennessee, passed March 17th, 1899, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in the payment of wages due to employees.

The caption and material portions of this Act are as follows:

"AN ACT requiring all persons, firms, corporations, and companies using coupons, scrip, punchouts, store orders, or other evidences of indebtedness to pay laborers and employes for labor, or otherwise to redeem the same in good and lawful money of the United States in the hands of their employes, laborers, or a *bona fide* holder, and to provide a legal remedy for collection of same in favor of said laborers, employes and such *bona fide* holder.

"Section 1. Be it enacted by the General Assembly of the State of Tennessee, That all persons, firms, corporations and companies, using coupons, scrip, punchouts, store orders, or other evidences of indebtedness to pay their or its laborers and employes, for labor or otherwise, shall, if demanded, redeem the same in the hands of such laborer, employe or *bona fide* holder, in lawful money of the United States; *Provided*, The same is presented and redemption demanded of such person, firm,

company or corporation using same as aforesaid, at a regular pay-day of such person, firm, company or corporation to laborers or employes, or if presented and redemption demanded as aforesaid by such laborers, employes, or *bona fide* holders at any time not less than thirty days from the issuance or delivery of such coupon, scrip, punchout, store order or other evidence of indebtedness to such employes, laborers or *bona fide* holder. Such redemption to be at the face value of said scrip, punchout, coupon, store order or other evidence of indebtedness; *Provided*, further, Said face value shall be in cash the same as its purchasing power in goods, wares and merchandise at the commissary, company store or other repository of such company, firm, person or corporation aforesaid.

"Sec. 2. Be it further enacted, That any employe, laborer or *bona fide* holder referred to in Section 1 of this Act, upon presentation and demand for redemption of such scrip, coupon, punchout, store order or other evidence of indebtedness aforesaid, and upon refusal of such person, firm, corporation or company to redeem the same in good and lawful money of the United States, may maintain in his, her or their own name an action before any court of competent jurisdiction against such person, firm, corporation or company, using same as aforesaid for the recovery of the value of such coupon, scrip, punchout, store order or other evidence of indebtedness, as defined in Section 1 of this Act."

Acts of Tenn., 1899, Chap. 11, p. 17.

The original bill was filed in the Chancery Court of Knox County, Tennessee, September 9, 1899. In it the complainant Harbison alleged that he was the *bona fide* holder by purchase in due course of trade of certain specified accepted orders for coal that had been issued by the defendant Company in payment of wages due to its employes; that he had made due demand for their redemption in cash, according to law, which had been refused; that said orders had been issued at the rate of twelve cents per bushel of coal, making the aggregate value of the orders held by him $1,678.00; and that he was entitled to a decree for this amount and interest.

Bill, Rec. pp. 2 to 16.

The answer denied that Complainant was a *bona fide* holder of the orders in question, and alleged that he had purchased them for a grossly inadequate consideration. The answer further set forth that defendant had a regular monthly pay-day, upon which it paid its employes their wages in cash, but that as a mat-

ter of convenience to its laborers, it was accustomed, in the interim, to accept from such of its laborers as desired, coal orders drawn by them for labor previously performed; that these orders were not used by all its employes; that they were drawn by its laborers without any compulsion on its part and without discrimination in the price of coal, but with some incidental profit arising from the increased sale of coal; that the Company would, nevertheless, redeem said orders in cash on a regular pay-day if presented by the laborers themselves, but would not redeem them for cash in the hands of transferees; that the orders in question were drawn voluntarily by its employes and without solicitation on its part and with a positive agreement between the Company and its employes at the time of their acceptance that the laborers would accept coal in payment, and that the Company would not be required to pay anything but coal. The answer denied that any law of the State could infringe upon this right of contract between the Company and its employes, and denied that Complainant was entitled to any recovery against it in the premises.

Answer, Rec pp. 17 to 20.

Proof was taken and the case heard by the Chancellor, who was of opinion that the Complainant was entitled to recover the money-value of the orders, and rendered a decree against the Defendant for $1,702.66 and the costs of the cause, from which decree the Defendant appealed.

Decree, Rec. p. 32.

On appeal the Defendant Company assigned errors insisting that the Chancellor erred in rendering a decree against it for the following reasons:

1. It was not intended by the Act of 1899 to prevent employers from issuing to their employees orders redeemable otherwise than in money, when this was done for the convenience of the employees, at their voluntary request and by agreement entered into after the labor had been performed.

2. That the Complainant was not a *bona fide* holder of the orders within the meaning of said Act.

3. That if it was intended by said Act to render void at the option of the employee a contract voluntarily entered into with his employer, after his labor had been performed, whereby he

agreed to accept an order for coal in payment of wages already earned by him, the Act conflicted with the Fourteenth Amendment of the Constitution of the United States in that it was a deprivation of liberty and property without due process of law.

4. That said Act, if so intended, also conflicted with the Bill of Rights of the Constitution of Tennessee, in that it was a deprivation of liberty and property otherwise than by the law of the land.

Assignments of Error, Rec. pp. 34-36.

The case was heard by the Court of Chancery Appeals of Tennessee, an intermediate Court of reference in equity causes.

The facts as found by that Court are as follows:

"The Defendant is a corporation chartered under Chapter 57, Acts of 1867-'8. The following powers are given by Section 4: 'To purchase, hold and dispose of such real estate, not to exceed seventy thousand acres, leases, minerals, iron, coal, oil, salt and personal property as they may desire, or as they may deem necessary for the legitimate transaction of their business; to mine, bore, forge, smelt, work and manufacture, transport, refine and vend the same. The company to have and enjoy, and exercise, all the rights, privileges and powers belonging to, or incidental to corporations, which may be convenient to carry out any business they are in this Act authorized to engage in.'

"The Defendant has its principal office at Knoxville, where it is engaged in the manufacture of iron. As an incident to this business, it also mines and sells coal. Its mines are located in Anderson County. It works about two hundred employees. It has now and has had for many years a regular pay-day, being that Saturday in every month which is nearest the 20th day of the month. Upon this pay-day each employee is paid in cash the amount then due him, excepting what may be due him from the first of the month up to said pay-day—that is, the Company keeps in arrears with its employees all the time to the extent of their wages for about twenty days' time, so far as concerns the matter of cash payments, but they may collect this sum and all sums that may be due them in coal orders, as stated below. It does not and will not pay cash to its employees for wages at any other time than upon said regular pay-days. Defendant, however, nearly always has on hand in its Knoxville yard a large amount of coal which it sells to all persons who are willing to purchase, whether such persons are its laborers or the public generally. For some time prior to the filing of the bill and at the time the bill was filed the defendant was and had been accumstomed to accept from its laborers after work had been performed orders for coal in the following form:

"'Let bearer have.....bushels of coal, and charge to my account.' .....

"The Defendant's employes are accustomed to sign orders, and in this form they are accepted by a stamp in these words:

"'Accepted.....1899.
"'KNOXVILLE IRON COMPANY.'

"Many of the Defendant's employes have never drawn an order on the Defendant, and many others have used them only in the purchase of coal for themselves; but the Defendant in this way pays off about seventy-five per cent. of the wages earned by its employees. Many of the employees who draw these orders get small wages, ninety cents to one dollar and twenty cents per day, and sell these orders to get money to live on, but those who get the largest wages, $65 to $175 per month, draw more of such coal orders in proportion than do those who get small wages. Defendant has never insisted upon any of its laborers giving any such orders but has been willing to accept such orders when any employe would draw them and ask their acceptance. Defendant, however, sets apart every Saturday afternoon, from one o'clock to five o'clock, for the acceptance of such orders. It makes some profit in accepting said orders in that, instead of paying the wages of its employees in cash, it pays them in coal at 12 cents per bushel, and also, to some extent, its coal business is increased thereby. On the other hand, such orders are a convenience to the Defendant's employees in the way of enabling them to realize on their wages before the regular monthly pay-day and up to that pay-day. When these orders are drawn by Defendant's employees and accepted, Defendant credits itself with said orders on its accounts with the persons so drawing them at the rate of twelve cents per bushel for the amount of coal called for by said orders. There is no proof of an express agreement between the Defendant and its employees that the orders should be paid only in coal, unless the face of the orders shall be construed as setting forth such an agreement. The only proof of any implied agreement to that effect is to be found in such inferences as may be drawn from the face of the orders and from the custom of the Company to issue them and the employes to receive them on other than the regular cash pay-days and the fact that no employe has ever presented one of such orders for redemption in anything else than coal. There is no proof of any compulsion on the part of the defendant upon its operatives, except in so far as compulsion may be implied from the fact that unless Defendants' operatives take their wages in coal orders they must always on each monthly pay-day suffer the Defendant to be in arrears about twenty days—that is, that on the regular pay-day on that Satur-

day which is the nearest the 20th of the month the Defendant will not pay wages, except up to the last day of the preceding month, but will pay in coal orders the whole wages due at the end of each week, and that such is the course of business between the Defendant and its employees. The Complainant purchased six hundred and fourteen of said accepted orders from Defendant's employees and within thirty days from the issuance of each of said orders he presented each of them to the Knoxville Iron Company, Defendant hereto, and demanded that it redeem them in cash, which was refused by Defendant. Complainant is a licensed dealer in securities and sent his agents among the employes of the Defendant to buy these coal orders. They had previously been selling at seventy-five cents on the dollar—that is, before the passage of Chapter 11, Acts of 1899—but he instructed his agents to give 85 cents on the dollar and the orders now in suit were purchased at that price. They amount in dollars and cents to $1,678.00. There is no evidence of bad faith on the part of the Complainant in the purchase of said orders."

Opinion Court of Chanc. App., Rec. pp. 66, 67.

On these facts the Court of Chancery Appeals held that none of Defendant's assignments of error were well taken, and rendered decree against the Defendant and its sureties for the amount of the original decree, interest and costs. From this decree the Defendant appealed to the Supreme Court of Tennessee, and there renewed its assignment of error.

Opinion Court of Chanc. App., Rec. pp. 66-90.
Decree Court of Chanc. App., Rec. p. 90.
Assignment of Error, Rec. p. 91.

The Supreme Court of Tennessee again overruled Defendant's assignments of error and held: 1st. That the Act of 1899 applied to the facts of this case and to the coal orders in question; 2nd. That Complainant was a *bona fide* holder of the orders; and 3rd. That the Act of 1899 did not conflict either with the Fourteenth Amendment of the Constitution of the United States, or with the Tennessee Bill of Rights. A decree was accordingly rendered against Defendant and its sureties for $1,728.28 and costs.

This decree contains the following specific recital and adjudication:

"The Court being of opinion that the Statute of Tennessee, constituting Chapter 11 of the Acts of 1899, whose validity has been drawn in question by the Defendant on the ground that it is repugnant to the Fourteenth Amendment to the Constitution

of the United States * * * is not repugnant * * * to said Amendment to the Constitution of the United States * * * and that said Statute is in all things valid, it is so decreed and adjudged."

Decree, Supreme Court of Tenn., Rec. p. 103.
Opinion, Supreme Court of Tenn., Rec. pp. 91-103.

To review this decree the case has been brought to this Honorable Court by writ of error to the Supreme Court of Tennessee, which was allowed by the Chief Justice of that Court to operate as a supersedeas.

Writ of Error, Rec. p. 105.

SPECIFICATION OF ERRORS.

The Plaintiff in error has assigned error to the proceedings and decree of the Supreme Court of Tennessee, as follows:

"1. The said Court erred in ordering, adjudicating and decreeing that the Statute of the State of Tennessee, constituting Chapter 11 of the Acts of 1899, under which the Defendant in error claimed a money recovery against the plaintiff in error, was not repugnant to the Fourteenth Amendment of the Constitution of the United States and was in all things valid, and in rendering a decree in favor of the Defendant in error and against the Plaintiff in error and its sureties for the sum of $1,728.28 and all the costs of the cause.

"2. The said Court erred, in that the validity of the aforesaid statute of the State of Tennessee, constituting Chapter 11 of the Acts of 1899, having been drawn in question by the Plaintiff in error, on the ground that it deprived the Plaintiff in error of its liberty and property without due process of law, and was repugnant to Section 1 of the Fourteenth Amendment of the Constitution of the United States, the decision of said Court was in favor of the validity of said Statute, and the aforesaid decree was rendered by said Court under the provisions of said Statute in favor of the Defendant in error and against the Plaintiff in error."

Assignments of Error, Rec. pp. 107, 108.

The third assignment of error is not now relied on and is withdrawn.

The substance of the assignments of error, specifically stated, is that the said Act of 1899 is repugnant to Section 1 of the Fourteenth Amendment for the reason that it deprives the plaintiff in error and all other employers of labor and employees in Tennessee of their liberty and property without due process of law, and that hence the Supreme Court of Tennes-

see erred in adjudging validity of said Act and in rendering a money decree against the Plaintiff in error in accordance with its provisions.

BRIEF OF THE ARGUMENT.

While the amount involved in this particular case is not large, the question here presented is one of the utmost importance, involving as it does for the first time in the history of this tribunal the definite consideration of a large and rapidly-growing class of latter-day legislative experiments, born of a spirit of unrest and agitation, making ever deeper and deeper inroads upon the liberty of private contract, and pregnant—either with good or with evil—for the future of our institutions. Concerning, as it does the relationship of employer and employed, it is of necessity interwoven with the deepest considerations of public policy. In nothing is the tide of paternalistic legislation sweeping higher than in the attempted regulation of the dealings between employers and employees. Experiments are being made upon every side, of every degree of novelty and merit. None of these have yet been presented for the final determination of this Court, and the limit of legislative action in this department is, hence, as yet undefined. The consequences of the decision of this question, which will inevitably determine to a great extent whether the present legislative tendency shall be checked or whether it shall be encouraged in its flood, involves far-reaching consequences whose ultimate results can scarcely be overestimated. If this Act be sustained it will in all probability be followed by much other legislation of the same character; if held unconstitutional the new departure in legislation will be checked.

The questions presented are not easy of solution; they are most complex and intricate, involving not only the proper adjustment and regulation of the relationship between different classes of society, but also the delicate adjustment of the powers of legislative initiative and judicial revision, and the proper solution of the vital question of the extent to which the public interest demands and justifies the infringement of that right of contract and liberty of individual action which has been the mainspring of Anglo-Saxon effort, the impelling force in its centuries of progressive development.

It is clear that a limit must somewhere be placed upon the exercise of legislative interference with the rights of property

and liberty, for if the entire matter be committed to the unrestrained exercise of legislative discretion, caprice or passion, reflecting waves, often violent, frequently transitory, of excited feeling, the Fourteenth Amendment will become a mere nullity, a meaningless and glittering generality, powerless to protect from that against which it was specifically framed to guard. It is equally clear, on the other hand, that some weight should properly be attached to the exercise of legislative discretion, however hasty and ill-considered the legislative action too frequently may be, and that the right of contract should not be permitted to stand as a bar in the pathway of social betterment and an obstruction to such legislation as the higher interest of the community in fact requires. *Salus populi est suprema lex.*

Midway then between legislative inaction upon the one hand, and legislative intermeddling upon the other, lies the true pathway of safety. The question in this case is upon which side of the line does the legislation under discussion fall.

On the one hand it is not necessarily an objection to legislation that it is paternal in its character, for there are some instances in which the State owes a fatherly protection to its wards; on the other hand, legislation is not necessarily justified because it assumes to protect those who are otherwise helpless, when, in fact, it may be a real hindrance to their cause, as well as injustice to others.

It is with a deep sense of the paramount importance of the question here involved, and the far-reaching consequences of its solution, that this argument is presented.

The Plaintiff in error relies upon the following points of law and fact:

I.

Among the rights of liberty and property protected by the provision of Section 1 of the Fourteenth Amendment to the Constitution of the United States that no State shall "deprive any person of life, liberty or property without due process of law," are the right to the acquisition and disposition of property, the right to labor in any lawful employment, and the right to enter into any lawful contract in reference to property or labor.

United States Constitution, 14th Amendment, Section 1.

Slaughter House Cases, 16 Wall (U. S.) 427.
Butchers' Union Co. vs. Crescent City Co., 111 U. S. 746, at 762, 764.
Allgeyer vs. Louisiana, 165 U. S., 578.
Holden vs. Hardy, 169 U. S., 391.
In re Tiberio Parrott, 1 Fed. Rep., 506.
The Stockton Laundry Case, 26 Fed. Rep., 614.
In re Grice, 79 Fed. Rep., 6.
In re Jacobs, 98 N. Y., 98.
People vs. Marx, 99 N. Y., 377.

"Property is everthing which has an exchangeable value, and the right of property includes the right to dispose of it according to the will of the owner. Labor is property, and, as such, merits protection; the right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property."

Mr. Justice Swayne in Slaughter House Cases, 16 Wall, U. S., 127.

"The right to follow any of the common avocations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen." * * * * "I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of the citizens of the United States."

Butchers' Union Co. vs. Crescent City Co., 111 U. S. 746, at 762 and 764, per Mr. Justice Bradley.

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

Allgeyer vs. Louisiana, 165 U. S., 589, per Mr. Justice Peckham.

"As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired,

it is safe to say that a State law which undertakes to deprive any class of persons of the general power to acquire property would also be obnoxious to the same provision. Indeed, we may go a step further and say that as property can only be legally acquired by contract, a general prohibition against entering into contracts with respect to property, or having as their object the acquisition of property, would be legally invalid."

Holden vs. Hardy, 169 U. S., 391.

"The term liberty, as protected by the Constitution, is not cramped into a mere freedom from physical restraint upon the person of the citizen, as by incarceration, but is deemed to embrace the right of man to be free in the employment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. In the language of Andrews, J., in Bertholf vs. O'Reilly, 74 N. Y. 515, the right to liberty embraces the right of man to exercise his faculties and to follow a lawful avocation for the support of life; and as expressed by Earle, J., in the matter of Jacobs, one may be deprived of his liberty, and his constitutional rights thereto violated, without the actual restraint of his person. Liberty, in its broad sense, as understood in this country, means the right not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation."

People vs. Marx. 99 N. Y., 377.

"The third absolute right, inherent in every Englishman, is that of property, which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or dimunition, save only by the laws of the land."

1 Blackstone's Commentaries, p. 138.

II.

Corporations are "persons" within the meaning of the Fourteenth Amendment, and their property and liberties are protected by its provisions.

Santa Clara Co. vs. Southern Pac., R., 118 U. S., 394.
Pembina Mining Co. vs. Oenna, 125 U. S., 181.
Minneapolis Ry. Co. vs. Beckwith, 129 U. S., 26.
Blake vs. McClung, 172 U. S., 239.

III.

While the constitutional guarantees of liberty and prop-

erty are not intended to restrict the legitimate exercise of the police power of the State, and while the State may, in the exercise of such police power, regulate and restrict the rights of property and liberty, including the right of making contracts, this is the full extent of the power of the State in such regulation and restriction, and every interference by the State with the rights of liberty and property not coming within the legitimate execise of the police power, is a deprivation of liberty and property without due process of law, and is unconstitutional and void.

See authorities above cited under 1st point.

IV.

While the exercise of the police power of the State is not limited to the primary police regulations, in the strict sense of the term, concerning either the public safety, health or morals, and may be exercised, in a sense almost equivalent to the general legislative power of the State, when necessary to the public interest and the welfare of the community at large, yet whenever it is sought to be exercised in matters affecting the public interest outside of those primary police duties of safety, health and morals, in which the public interest is intimately and inseparably connected with that of every individual, the impairment of the individual rights of property and liberty can only be justified when it is shown to be demanded by the public welfare and the interest and well-being of the community at large as distinguished from the well being of a particular class only.

Lawton vs. Steele, 152 U. S., 133.

Thus in a case in which it was held by this Court that a Massachusetts law prohibiting the sale and manufacture of intoxicating liquors is not repugnant to the Constitution of the United States, Mr. Justice Bradley delivering the opinion of the Court, emphasizes the importance of the primary police duties, as follows:

"Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals. The Legislature cannot, by any contract,

divest itself of the power to provide for these objects. They belong emphatically to the class of objects which demand the application of the maxim, *Salus populi suprema lex*, and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself."

Boston Beer Co. vs. Massachusetts, 97 U. S., 992.

Later the distinction between the primary police duties and others of a more general legislative character, is clearly stated by Mr. Justice Brown in the opinion in the case of Lawton vs. Steele:

"It (the police power) is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance * * * Beyond this, however, the State may interfere wherever the public interest demands it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. *To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference;* and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

Lawton vs. Steele, 152 U. S., 133.

V.

The rights of property and liberty of one class of the community can never be taken away by the Legislature in the exercise of its police power merely to secure financial advantage to another class of the community, however large and deserving such other class may be.

While this proposition is not specifically stated in any decision, it is the result, by a process of exclusion, from all the reported cases on this subject, there being, it is believed, no reported case in which the exercise of the police power has been sustained on the ground that the particular legislation was of financial benefit to one class of the community, as distinct from its safety, morals or health, in which the public interest was directly and vitally concerned.

To put the proposition in another way: The State has a

paramount interest and an inalienable duty in reference to the safety, health and morals of every class of its citizens; and in the protection of the safety, health or morals of any class of its citizens, it may, if necessary, impair individual liberty and property. It has, however, no such vital and paramount interest in the financial condition of every particular class of its citizens and it cannot deprive any of its citizens of their liberty and property merely to enrich another class of its citizens; in short it has no legitimate interest in the transfer of property from one of its citizens to another.

It is evident that if the proposition were ever established that the State could take the property and liberty of one class of its citizens to enrich another, there would be no limit to legislative encroachment upon constitutional guarantees; nor bar to absolute confiscation; no line that could be drawn between partial infringement and the absolute transfer by legislative fiat of the property of one to the pocket of another.

VI.

The right of contract and other rights of liberty and property may be more freely infringed when necessary to protect the public safety, health or morals, than they can for the indefinite purpose of promoting the public welfare in general. This arises from the paramount duty of the State to protect the life, health and morals of its citizens, their preservation constituting an overruling necessity which often justifies the interference with individual rights that would be exempt from infringement upon general and indefinite considerations of public benefit.

Thus in the case of *Holden vs. Hardy, 169 U. S., 397*, in which an Act of the Utah Legislature, which provides that except in cases of emergency the employment of workmen in underground mines should be limited to eight hours per day, was held constitutional by this Court as an exercise of the police power of the State in reference to the public health, Mr. Justice Brown, delivering the opinion of the Court said:

"We have no disposition to criticise the many authorities which hold that State statutes restricting the hours of labor are unconstitutional. Indeed, we are not called upon to express an opinion upon this subject. It is sufficient to say of them that

they have no application to cases where the Legislature had adjudged that a limitation is necessary for the preservation of the health of the employees and there are reasonable grounds for believing that such determination is supported by the facts."

Holden vs. Hardy, 169 U. S., 397.

This distinction between the right of interference with individual rights in the matter of the primary police duties of the State, and more general care of the general welfare of the community, is rendered doubly necessary for the inherent reason that in the very nature of things matters affecting the health, safety and morals, are capable of a fairly precise and exact determination, of sufficient definiteness and certainty to justify interference with private rights for their protection, while matters affecting the general welfare of the community, involving as they necessarily must, the operation of many and complicated economic and social forces, lead inevitably into the field of speculation and uncertainty and to conclusions which are too inexact and doubtful to constitute a ground for the infringement of individual rights protected by fundamental constitutional guarantees.

In short the legislative justification for depriving any citizen of his life and property, must be based upon a *public* benefit that is reasonably certain and not merely upon conjectures and possibilities.

Thus the Supreme Court of Colorado, while stating that the Legislature, where the facts justify discrimination, may in the exercise of its police power, pass health laws affecting only certain classes, citing in support of this proposition the case of Northwestern Fertilizer Co. vs. Hyde Park, 97 U. S. 659, where a law was upheld abstaining a nuisance obnoxious only to part of the community, criticises as follows the doctrine that the State may therefore lawfully pass laws providing for the welfare of any one class of the community, at the expense of others:

"In some cases are found such expressions, (*dicta*, it is true) as that the State has such an interest in each citizen that it may protect him against the consequences of his own rashness, and, upon the theory that the State is made up of the sum of all its parts, it may, for each individual and for his supposed good, prescribe any regulations that are appropriate and suitable for the whole. In other words, this theory is based upon the proposition that each part making up the whole includes each part.

This, in principle, is the same as the theory that would authorize the State to prescribe any regulations it saw fit for keeping a citizen out of its jails, hospitals, or poor-houses, because it is a legitimate function of government to levy and collect taxes for such institutions. The argument in support of such a theory is specious, and while in one sense (but to a limited extent only) true, yet like all other argument from analogy, it is dangerous and should be carefully circumscribed. If the theory is correct the State would be justified in prescribing the most minute details for the regulation of the personal conduct of individual citizens, as to things in no wise affecting the great public interests. Whenever a man fails in business, or loses a fortune by some great calamity, or droughts or floods destroy his crops the Legislature could levy a tax or make an appropriation, and therefrom establish him in business or make good the loss. The practical application of the theory would destroy the fundamental principles upon which our government is founded."

Re Morgan, Col., 1899, 47 L. R. A., 52.

"Powers, the exercise of which can only be justified on this specific ground (namely, under what is usually denominated the police power) and which would otherwise be clearly prohibited by the Constitution, can be such only as are so clearly necessary to the safety, comfort or well being of society, or so imperatively required by the public necessity as to lead to the rational and satisfactory conclusion that the framers of the Constitution could not, as men of ordinary prudence and foresight, have intended to prohibit their exercise in the particular case, notwithstanding the language of the prohibition would otherwise include it."

People vs. Road Co., 9 Mich. 295, per Christiancy, J.

VII.

While there is a presumption in favor of the validity of State legislation, yet the legislative determination is subject to revision by the Courts, and the attempted exercise of police powers will not be upheld if it bears no substantial relation to the welfare of the public at large and arbitrarily interferes with the rights of individuals under the guise of protecting the public interest. The police power cannot be put forward as an excuse for oppression and unjust legislation.

Yick Wo vs. Hopkins, 118 U. S., 356.
Holden vs. Hardy, 169 U. S., 366.
Palmer vs. Tingle, 55 Ohio St., 423.
Guthrie's Fourteenth Amendment, p. 76.

Mr. Justice Brown, in defining the limits of the police power of the State, says:

"To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the necessities of the public generally, as distinguished from those of a particular class, require such interefernce; second, that the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, in the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual or unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the Courts."

Lawton vs. Steele, 152 U. S., 133, at 137.

"Any regulation of the internal affairs of the State, fairly subserving a valid police purpose, and reasonably exercised for the benefit of the community at large, will be upheld; but if it be arbitrary and have no substantial relations to the health, morals, peace or welfare of the community, it will be nullified."

Guthrie's Lectures on the Fourteenth Amendment, p. 76.

"Contracts and compacts have been entered into between men, tribes and nations during all time from the earliest dawn of history; and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our Constitution, and it may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare, and equal protection and benefit of the people, must appear, not only to the General Assembly, by force of popular clamor or the pressure of the lobby, but also to the Courts; and it must be so clear that a Court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people."

Palmer vs. Tingle, 55 Ohio St., 423, s. c., 45 N. C. 313.

VIII.

The Tennessee Act of 1899, preventing the making of an enforceable contract between employer and employee as to the method of payment of wages, whether due or not due, and requiring the payment of such wages in money in spite of such contract, is an arbitrary attempt, under the guise of protecting the public interest, to interfere with the liberty and property of both the employer and employee, needlessly limiting their right of contract, and equally op-

pressive to both; it bears no substantial relation to the public welfare; it cannot therefore be justified as an exercise of the police power of the State, and is repugnant to the Fourteenth Amendment and void.

The effect of the Act of 1899, as construed by the Supreme Court of Tennessee, is to provide that where an employee, after he has performed services, voluntarily, as a matter of his own convenience, without any constraint upon the part of his employer, draws an order for merchandise in payment for such services and presents the same to his employer, by whom it is accepted, such order shall not be redeemable in merchandise alone as contracted by the parties, but shall, at the option of the holder of said order, be redeemable in money, and that the contract made between the employer and the employee at the time the order was drawn and accepted shall be thus annulled.

In the case at bar it was shown by the proof, and found as a fact by the Court of Chancery Appeals that the "Defendant has never insisted upon any of its laborers giving any such orders, but has been willing to accept such orders when any employe would draw them and ask their acceptance;" that "many of Defendant's employees have never drawn an order on the Defendant, and many others have used them only in the purchase of coal for themselves," and that "such orders are a convenience to Defendant's employees in the way of enabling them to realize on their wages before the regular pay-day and up to that pay-day."

Opinion Court of Chan. App., Rec. pp. 66-67.

The statute in question therefore makes no exception in favor of contracts beneficial to the laborers and voluntarily entered into by them; it absolutely bars all contracts of this character between employer and employee, whether voluntarily made or induced by oppression: it in short, absolutely prevents the making of any enforceable contract between employer and employed in reference to the payment of wages, whether made voluntarily by the employee at his own instance and for his benefit, or induced by compulsion of the employer.

(Perhaps also, under a possible construction of the word "otherwise," as used in the Act in reference to payments made to laborers in payment of wages "or otherwise," any payment of merchandise orders by an employer to his employees, even for an

independent purchase of property outside of matters relating to the employment, would likewise be prohibited.)

The wise and the unwise contract; the just and the unjust employer; the provident and the improvident employee, are all placed in the same category, and come within the same ban; all contracts alike for the payment of wages, without exception, are declared *mala prohibita*.

Manifestly, therefore, this legislation cannot be sustained simply on the ground that there may be some cases of oppression on the part of employers, and that oppressive contracts will thereby be prevented, since voluntary and beneficial contracts also come within its penalties.

The result cannot be different even though many contracts are embraced in the Act which are legitimately the subject of legislation, since if it interferes with a single class of contracts which are proper in themselves and are protected by the Constitution the Act must fall as a whole.

Allgeyer vs. Louisiana, 165 U. S., 578.
Bank vs. Divine Grocery Co., 13 Pickle, 603.

It is respectfully submitted that no consideration of public necessity or public welfare demands this indiscriminate and wholesale assault upon the right of contract.

Public policy, declares Sir George Jessel, in the case of *Printing Co. vs. Sampson, L. R., Eq. Cas., 462*, requires the utmost liberty of contracting.

The right of contract lies at the very basis of civilized institutions; its free exercise has been the indispensable condition and the most efficient cause of continued growth and development; its infringement can only be justified by the plainest demands of an overruling public necessity.

That the Tennessee statute in question infringes upon the right of free contract cannot be denied; upon what consideration of public necessity can it then be justified?

Conceding to this enactment every presumption properly attaching to the exercise of legislative discretion, it is respectfully submitted that it does not fairly serve any valid police purpose and bears no substantial relation to the welfare of the community.

1. *In the first place, even on its face the Act is not passed to further the general welfare of the entire community, but is ostensibly in furtherance of the particular interest of an especial class of the community only, to-wit, the laboring class.*

Even, therefore, if it should accomplish all that were claimed for it, and however desirable it might otherwise be, it would be subject to constitutional objection, as it would fall outside the limits of the valid exercise of the police powers as laid down in *Lawton vs. Steele, supra*, as it would be an interference with the right of contract, not appearing to be required by the interests of the public generally as distinguished from those of a particular class.

2. ***In the second place, the Act relates to none of the primary police duties of the State, in that it does not concern either the health, morals or safety of any portion of the community. It assumes to relate solely to the financial well-being of one class of the community only,*** and is, in its last analysis, an attempt to benefit employees at the expense of employers by compelling the payment of wages in money, on the theory that thereby the employer will lose the profit arising from an indirect sale of merchandise to the laborers and will as a result be compelled to pay higher wages. In short, it is an indirect attempt on the part of the Legislature to fix a rate of wages, which cannot be logically distinguished from an attempt to absolutely fix a rate of wages at a definite limit.

If the legislation may lawfully provide for the payment of wages in money, it is only one step further, and that too a very short step, to declare that, in order to promote the general welfare, all employers shall pay an arbitrary and fixed rate of wages, to be fixed by statute.

The Act therefore, cannot be justified as a legitimate exercise of the police powers of the State since that power can never be invoked merely to enrich one class of the community, whether they be employees or employers, at the expense of another in a manner affecting neither the health, morals or safety of the community or the welfare of the community as a whole. If the right of contract can be destroyed for such financial benefit to one class only, there is no limit short of the legislative confiscation of private property for the purpose of making a more equal distribution of wealth. Yet, however desirable an equal distribution of wealth might be, it is clearly a consummation beyond the power of the State Legislature.

3. ***In the third place, while the Act is sought to be supported as a financial benefit to the laboring class, it is in reality***

not a financial benefit to the laboring class as a whole, and as a matter of fact will only give a temporary financial benefit to one section of the laboring class only, to-wit: the improvident, and to the usurers who fatten upon them, and will give even this temporary assistance at the expense of the families of the improvident laborers. Of course, if the law is enforced, its result will be to prevent the issuing of coal orders and to limit the payment of wages to the monthly pay-day.

Under the present system where orders are issued in payment of wages every week, especially general merchandise orders, the laborers have two distinct advantages. In the first place, they get their wages much sooner than they could otherwise be paid under the cash basis, and second and chiefly, a very large proportion of wages, as the Court will take judicial knowledge, finds its way to the house wives and is used by them in the purchase of goods and supplies for the benefit of the family, while on the contrary, where the payment of the wages is deferred to the end of the month and a large cash payment made at one time, the amount of wages of the improvident class of laborers that is wasted away in dissipation is greatly increased. Thus the burden falls most heavily upon the families of the improvident, on the wives and children of those who are especially subject to temptation and who are most prone to waste their cash wages in this manner. On the other hand, very few merchandise orders ever find their way into the bar-keeper's till.

The argument may be thus stated:

So far as the provident and careful workman is concerned, the Act is ineffective one way or the other. If he asks for orders in payment of his wages in advance, he does it purely as a matter of convenience and benefit to himself and his family and will not sell them at any great discount.

To the improvident workman on the other hand, while the temporary effect of the Act is to enable him to sell for cash a few orders at an advanced rate, and to allow a few parties, as the Complainant did in this cause, to profit by their purchase at a rate of discount equal to 180 per cent per annum, yet the ultimate effect, if the law is held constitutional, will be to cut off this anticipation of wages in orders and thus deprive the families of the improvident of a large per cent. of the wages and to deflect it into channels of waste and dissipation.

No reason of public policy has been cited in the argument

that justifies this arbitrary interference with individual rights; while on the contrary, the consequences of the Act, even if effective, will be nothing but hardship as above shown.

In making this argument, the plaintiff in error, while not admitting that it is lacking in interest in the welfare of its employees, still does not assume to represent them in this case or to base its argument solely upon the hardships to them, but it does conceive that the natural and inevitable consequence of the Act, and especially its effect upon the very class whom it is designed to protect, is a legitimate subject of inquiry addressing itself to the Court in the determination of the question as to whether or not there is any public benefit to be obtained which will justify this extraordinary legislation. It is to throw light upon this question alone that this argument is advanced.

4. ***In the fourth place the legislation in question is futile and unconstitutional for the reason that it must of necessity be unavailing.*** Its only object can be to attempt to enforce a higher rate of wages through payment in cash instead of merchandise. Its framers, however laudable their motives, overlooked, however, the fundamental fact that wages are necessarily the result of the operation of economic laws, depending, in the last analysis, upon the law of supply and demand, which regulates the rate of wages as inevitably as it regulates the rate of interest upon capital. With a given competition to which the industries of the State are subjected, in the struggle for existence in the markets of the world, in conflict with the industries of other States and other countries, the rate of wages cannot be permanently fixed higher than the result of this competition will justify, so that even if, through the operation of this present law or any other similar law, the rate of wages should be temporarily raised above what economic laws would justify in the face of this competition, the inevitable result must be, to that extent, a cessation of industry and driving of both capital and labor from the domain of the State.

However desirable it may be to raise the rate of wages, it is a futile effort upon the part of the Legislature of any one State to endeavor, single-handed, to accomplish this result, and the endeavor can only result in the permanent injury to its industries and in inevitable disaster both to those who employ labor and to those who are employed. Even useless and unnecessary hampering of industry will inevitably affect injuriously the laborers, as well as the employers.

The Act in question is therefore obnoxious to the Constitution for four grounds:

1. It is a special legislation attempting to affect the welfare of one class only.

2. It attempts to affect the welfare of this class neither in health, morals or safety, and only in the matter of finance.

3. It really affects only a sub-class of that class, namely, the improvident, and while it may benefit this sub-class and their usurious friends temporarily, it results in the long-run in the injury of the entire laboring class, and is especially harmful to the families of the improvident.

4. It is a futile attempt to change the economic laws that can accomplish no result except to injure all the industries of the State, and all who gain employment or profit through these industries.

IX.

The unconstitutionality of the legislation in question is established by the overwhelming weight of authority.

The regulation of the relationship of employer and employee has been for several years a favorite subject of legislative interference, and repeated attempts have been made to enforce this and similar legislation, but almost without a dissenting voice the Courts of the land, in spite of the natural and proper inclination to uphold State legislation, recognizing the far-reaching and injurious consequences of such legislation, have been constrained to declare it unconstitutional and refuse it judicial sanction.

The authorities can be most profitably considered in three classes:

1st. Cases involving the precise question of the right of the Legislature to require the payment of wages in money;

2nd. Similar cases involving the question of the right of the Legislature to regulate in other respects relation of employer and employee, and interfere with the right of contract between them, and

3rd. Other cases involving the question of legislative interference with the rights of liberty and property, especially that of private contract.

An examination of these several classes of cases in their order will establish the following propositions:

First. Under the overwhelming weight of authority, statutes which attempt to enforce the payment of wages in money, and take away from the employer and laborer the right of contracting otherwise, are invalid and unconstitutional.

There are seven reported cases involving this precise question, in addition to the case now under review.

1. In a Pennsylvania suit brought by an employee to recover money on an order drawn by him on his employer, payable in coal, the plaintiff relied on an Act of the Pennsylvania Legislature, passed in 1881, which provided that all orders given by employers engaged in manufacturing, to their workmen, payable in goods, or anything but money, should be void. The Supreme Court held the sections of the Act containing these provisions to be void, saying:

They "are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the Legislature to do what, in this country, cannot be done; that is, to prevent persons who are *sui juris* from making their own contracts. The Act is an infringement alike of the right of the employer and the employee. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive to his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."

Godcharles vs. Wigeman, 113 Penn., 431, s. c., 4 Cent. Rep. 887; 6 Atl. Rep., 354.

2. Again it was subsequently held that the requirement of the Pennsylvania Act of 1891, providing "that miner's wages shall be paid in lawful money of the United States is unconstitutional so far as it attempts to preclude miners from making valid contracts to accept other than money in payment of their wages."

Showalter v. Ehlan, 5 Pa. Super Ct., 242; cited in 4 Gen. Digest, p. 350.

3. An Act passed by the Legislature of West Virginia in 1887, making it a misdemeanor for any person, firm, corporation or association engaged in mining or manufacturing coal or other

minerals, or in other kind of manufacturing, to issue for the payment of labor any order or other paper unless it was made payable to the employee or bearer and purported to be redeemable within a period of ninety days for its face value in lawful money of the United States, with interest, was also declared unconstitutional. The Court in delivering its opinion said:

"A person living under the protection of the United States Government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit, and, as incident to this, has the right to labor or employ labor, make contracts in respect thereof, upon such terms as may be agreed upon by the parties; to enforce all lawful contracts; to sue and give evidence, and to inherit, lease, purchase, sell and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitute the essential distinction between freedom and slavery; between liberty and oppression. These principles have been fully recognized and announced in many decisions of the Supreme Court of the United States and other Courts * * * * * The vocation of an employer, as well as that of his employee, is his property. Depriving the owner of property of one of its attributes is depriving him of his property under the provisions of the Constitution. (People vs. Otis, 90 N. Y., 48). The right to use, buy and sell property, and contract in respect thereto, including contracts for labor—which is, as we have seen, property—is protected by the Constitution. If the Legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful contract or business, then it may prevent the prosecution of all trades, and regulate all contracts."

State vs. Goodwill, 33 W. Va., 179, s. c.; 6 L. R. A., 621, (1889).

4. Subsequently an Act passed by the West Virginia Legislature in 1891, making it a misdemeanor for any corporation, company, firm or person, to issue to any employee in payment of wages due, or as advance for wages not due, any scrip or evidence of indebtedness payable otherwise than in lawful money, which was passed at a time when legislation of this character was all the fashion, was again presented to the Supreme Court of West Virginia, and the Court then stood three for and three against the constitutionality of the Act; so that under a provision requiring a majority of the Court to declare an Act unconstitutional the validity of the Act was thus sustained.

Peel Splint Co. vs. State, 36 W. Va., 802, s. c.; 17 L. R. A., 385 (1892.)

5. An Act passed by the Legislature of Missouri, in 1889, made it a misdemeanor for any corporation, person or firm engaged in manufacturing or mining to issue for the payment of labor any order or other evidence of indebtedness payable otherwise than in lawful money of the United States, unless the same was negotiable and redeemable at its face value in cash or in supplies at the option of the holder. This Act was held by the Supreme Court of Missouri to be unconstitutional, the ground of the decision being thus stated by the Court in its opinion:

"Liberty, as we have seen, includes the right to contract as others may, and to take that right away from a class of persons following lawful pursuits is simply depriving such persons of a time honored right which the constitution undertakes to secure to every citizen. Applying the principle of constitutional law before stated, we can come to no other conclusion than this, that these sections of the statute are utterly void. They attempt to strike down one of the fundamental principles of constitutional government. If they can stand, it is difficult to see an end to such legislation, and the government becomes one of special privileges instead of a compact 'to promote the general welfare of the people.' We place our conclusion on the broad ground that these sections of the statute are not 'due process of law' within the meaning of the constitution."

State vs. Loomis, 115 Missouri, 307, s. c.; 21 L. R. A., 789, at p. 804 (1892.)

6. A statute passed by the Legislature of Indiana in 1887 provided that all employees engaged in mining or manufacturing "shall be paid at least once in every two weeks in lawful money of the United States, and that any contract to the contrary, or to waive the provisions of the statute, should be null and void." This statute was held valid as applied to an *antecedent* contract entered into by the employee prior to his employment by which he waived in advance the provisions of the statute, but the Court expressly stated that it did not "preclude parties from making an accord and satisfaction after wages have been earned and services rendered," the implication being that, if such had been the effect, it would be unconstitutional. The case, therefore, is strong authority against the constitutionality of the Act of 1899, as applied to the facts in the case at bar, where it is held to prevent such voluntary contract as to the mode of payment of wages made after the services have been performed.

Hancock vs. Yaden, 121 Indiana, 366, s. c.; 6 L. R. A., 576.

7. Under an Act of the Kansas Legislature, passed in 1897, it was made unlawful for any corporation or trust employing ten or more persons, or its agent, to pay wages, due or to become due, in any scrip, order or other evidence of indebtedness, the Act requiring wages to be paid only in lawful money of the United States, or bank check or draft, and declaring void all contracts or agreements in violation of the Statute. The manager of a corporation was convicted of a violation of the Statute in having delivered to an employee in payment of wages a store order for which the laborer had voluntarily applied between pay-days, although by waiting until the regular pay-day he would have received his wages in money. On appeal to the Supreme Court it was held that the Act could not be sustained as an amendment or corporation charters, and that it was in violation of the Fourteenth Amendment in that it made an arbitrary and unauthorized classification, and also on the broad ground that it arbitrarily interfered with the right of contract between persons *sui juris*. Smith, J., delivering the opinion of the Court said:

"However much the employed might profit by the necessities of the employer desiring to exchange property for labor at a value advantageous to the former, all such beneficial agreements are prohibited by this law. In short, such legislation infringes upon natural rights and constitutional grants of liberty. It treats the laborer as a ward of the government, and discourages the employment of those talents which lead to success in the fields of commercial enterprise. Persons *sui juris* need no guardians. Those who seek to put a protector over labor reflect upon the dignity and independence of the wage earner, and deceive him by the promise that legislation can cure all the ills of which he may complain. *Such legislation suggests the handiwork of the politician rather than the political economist* * * *

"It has been sought by some judges to justify legislation of this kind upon the theory that, in the exercise of police power, a limitation necessary for the protection of one class of persons against the persecution of another class, may be placed upon freedom of contract. As between persons *sui juris*, what right has the Legislature to assume that one class has the need of protection against another? In this country the employee today may be the employer next year, and laws treating employees as subjects for such protective legislation, belittle their intelligence and reflect upon their standing as free citizens. It is our boast that no class distinctions exist in this country. An interference by the Legislature with the freedom of the citizens in making contracts, denying to a part of the people, possessing

sound minds and memory, the right to bargain concerning the equivalent they may desire to receive as compensation for their labor, is to create or carve out a class from the body of the people, and place that class within the pale of protective laws which invidiously distinguish them from other free citizens; thus dividing by arbitrary fiat equally free and intelligent people into distinctive classes or grades, the one marked by law as the object of legislative solicitude, the other not. This discrimination has been justified by writers defending the doctrine of paternalism, and by some judges, upon the asserted fact that labor is constantly engaged in an unequal contest with capital and that the former must be reinforced by the legislative power of the State, to prevent its overthrow in the conflict.

"Freedom of action—liberty—is the corner-stone of our governmental fabric. Laws which infringe upon the free exercise of the right of a workingman to trade his labor for any commodity or species of property which he may see fit, and which he may consider to be the most advantageous, is an encroachment upon his constitutional rights, and an obstruction to his pursuit of happiness. Such laws as the one under consideration classify him among the incompetents and degrade his calling. The proportion of lawful money in circulation is small, compared with the value of other property in the United States. Accumulated wealth, much or little, is represented in a very small part by money. *To say that a free citizen can contract for or agree to receive in return for his labor one kind of property only, and that which represents the smallest part of the aggregate wealth of the country, is a clear restriction of the right to bargain and trade, a suppression of individual effort, a denial of unalienable rights.*"

State vs. Haun, Supreme Court of Kansas, Dec. 9, 1899, s. c.; 47 L. R. A., 369 at 374 and 375.

It will be noted that in all of the foregoing cases the opinions of the court were not based merely upon the fact that they were class legislation, but were based either entirely or as one of the grounds of the decision, upon the broad principle that such legislation arbitrarily infringed the fundamental rights of property, liberty and contract, and were in violation of the constitutional provisions guaranteeing the protection of such rights.

To summarise: *It will be seen that the right of the Legislature to require the payment of wages in money has been passed upon in seven reported cases, in addition to the case at bar. In five of these cases, two from Pennsylvania, one from West Virginia, one from Missouri and one from Kansas, such legislation has been held unconstitutional as violating the right of*

contract; in one case from West Virginia, the court was evenly divided, and in one from Indiana the court, in upholding the validity of the act, specifically limited its application to the prohibition of antecedent contracts entered into before the employment. The Supreme Court of Tennessee stands single and alone in maintaining the constitutionality of such legislation by affirmative opinion. Thus the overwhelming weight of authority is in support of the proposition that such legislation, when applied to the facts in the case at bar, is unconstitutional and void.

It is insisted in argument on behalf of the complainant that the foregoing cases are distinguishable from the case at bar in that in most of them the payment of wages otherwise than in money was prohibited under penalty, while in the case under discussion such payment is not prohibited, but the law, it is said, merely regulates such payments and provides that when made in any evidence of indebtedness they shall be redeemable in money. Manifestly, however, this is a distinction without a difference in principle.

The Tennessee Act in substance attempts to make a new contract for the parties, and instead of enforcing their contract, declares that it shall not be enforced.

When the laborer draws a merchandise order on his employer, and it is accepted by the employe and delivered to the laborer in payment of wages, their contract is that the laborer will accept this merchandise in payment of his wages, but the Tennessee law attempts to prevent the enforcement of this contract as made and to say that although the contract calls for the payment of the wages in merchandise they shall be payable in money at the subsequent option of one only of the contracting parties, the laborer, or his assignee.

If the Legislature has no power to prohibit a contract providing for the payment of wages otherwise than in money, it clearly has no power to change the contract by providing that it cannot be enforced according to the terms of the contract. A law preventing the enforcement of the contract according to its terms as agreed upon by the parties, is, in principle, as much a prohibition of the right of the parties to contract as if it were in its terms an absolute prohibition. To prohibit the enforcement of the contract as the parties have made it, and control or

modify its terms, is equivalent to a prohibition of the contract itself. A contract that is not enforceable is not a valid contract; to declare it not enforceable is to declare it invalid and prohibit it.

Second. Similar attempts of State Legislatures to arbitrarily interfere with the relationship of employer and employee in other matters, and to deprive them of the right of mutual contract, have also been held unconstitutional by a well nigh unbroken line of authority.

The following cases establish this proposition:

1. An Act of the Legislature of Illinois requiring the owner of every coal mine to furnish a scale upon which all coal should be weighed, which should be subject to inspection by the miner and all other parties interested, providing for punishment by fine or imprisonment in case of violation, and declaring void all contracts dispensing with the weighing of coal in such manner void, was held by the Supreme Court of Illinois to be void, because it was not the law of the land.

Miller vs. People, 117 Ill. 294, s. c., 5 W. R., 15.

2. An Act of the Legislature of Illinois, declaring it a misdemeanor for any employer engaged in mining or manufacturing to be interested in any store or scheme for furnishing of supplies of any kind to his employees, was declared by the Supreme Court of Illinois to be unconstitutional, the particular ground upon which the decision was based being that the Act was partial legislation, in that it was made unlawful for certain individuals only to run a store in connection with their business. The Court, however, quoted with approval the language of other Courts to the effect that the Legislature had no power to deprive a person of the right to follow a lawful business and to make valid contracts as an incident thereto.

Frorer vs. People, 141 Ill. 171, s. c., 16 L. R. A. 492 (1892).

3. An Act of the Illinois Legislature providing that the wages of coal miners, if based on the quantity of coal mined, should be computed on the whole quantity before screening, and that all coal should be weighed in the cars before being dumped into screens or chutes, and making a violation of said Act a misdemeanor, was held by the Supreme Court of Illinois to be void, on the ground, as stated in the syllabus, that it was "an attempt

to take away, without due process of law, the property right of contracting in respect to such wages."

Ramsey vs. People, 142 Ill. 380, s. c. 17 L. R. A., 853.

4. An Act of the Illinois Legislature which required every manufacturing, mining, quarrying, lumbering, mercantile, street, electric and elevated railway, steamboat, telegraph, telephone, and municipal corporation, incorporated express company and water company, to pay the wages of its employees weekly, was held by the Supreme Court to be unconstitutional. In the course of its opinion the Court said:

"Property in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be required over it. And the right of property preserved by the constitution, is the right not only to possess and enjoy it, but also to acquire it in any lawful mode, or by following lawful industrial pursuits which the citizen, in the exercise of the liberty guaranteed, may choose to adopt. Labor is the primary foundation of all wealth. The property which each one has in his own labor is the common heritage. And, as an incident to the right to acquire other property, the liberty to enter into contracts by which labor may be employed in such a way as the laborer shall deem most beneficial, and of others to employ such labor, is necessarily included in the constitutional guarantee."

Braceville Coal Co. vs. People, 147 Ill. 66, s. c. 23 L. R. A., 340, (1893).

5. An Act of the Illinois Legislature, passed in 1887, as amended by an Act of 1891, required all coal operators in the State who paid their miners by weight to provide accurate scales for the weighing of all coal hoisted or delivered from their mines, and further required that all coal should be accurately weighed and a record of the same should be kept for the inspection of the miners, was also declared unconstitutional by the Supreme Court, the Court, among other things, saying:

"It seems that a law which deprives men engaged in the business of mining from contracting with each other for the purpose of ascertaining the weight of coal mined, or the amount due them, in any manner mutually satisfactory, cannot be sustained. That such is the effect of this law is the contention of counsel for the people, and it is only upon the assumption that the law does so control the power to contract that a conviction could have been had in this case; for, as already seen, the parties had contracted

otherwise. The Act takes away the freedom of contracting by the parties for the ascertainment of the weight of coal, except by a certain method, and, in our opinion, it is unconstitutional."

Harding vs. People, 160 Ill. 459, s. c. 32 L. R. A., 455, (1896).

6. A Pennsylvania statute which required monthly payment of wages by mining or manufacturing companies was held unconstitutional so far as it amounted to making a contract between parties against their will, and it was further held that the Act could give no right to the payment of wages before the time agreed upon by the parties by reason of a provision that a contract for payment otherwise than according to the statute should be void.

Bauer vs. Reynolds, 3 Penn. Dist. Rep., 502.

7. A statute which declared it to be unlawful to screen coal before it was weighed and credited to the miner, when such miner was paid by weight or quantity, was held unconstitutional.

Commonwealth vs. Brown, 6 Penn., Dist Rep., 773.

8. An Act of the Legislature of West Virginia, which made it a misdemeanor for any employers engaged in mining or manufacturing, to sell any merchandise or supplies to any employee at a greater per cent. of profit than to other customers buying for cash and not employed by them, was held by the Supreme Court to be unconstitutional, the Court saying, in the course of its opinion:

"It is an attempt on the part of the Legislature to do what, in this country, cannot be done; that is, to prevent persons who are *sui juris* from making their own contracts. The Act is an infringement alike of the rights of the employer and the employee. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. * * * * * * * The ground on which this Act is condemned is, that it is class legislation, and an unjust interference with the rights, privileges and property of both the employer and the employee, and places upon both the badge of slavery by denying to one the right of managing his own private business, and assuming that the other has so little capacity and manhood as to be unable to protect himself or manage his own private affairs."

State vs. Fire Creek Coal Co. 33 (W. Va.) 188, s. c., 6 L. R. A., 359.

9. An Act of the Missouri Legislature, which provided that it should be unlawful for an employer to prohibt an employee from joining, or to require an employee to withdraw from, a trade or labor union, or other lawful organization, was held to be in violation of that article of the Missouri constitution which declared that no one should be deprived of life, liberty or property without due process of law, and of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The Court said:

"Here, the law under review declares that to be a crime which consists alone in the exercise of a constitutional right, to-wit: that of terminating a contract—one of the essential attributes of property, indeed property itself, under preceding definitions. * * * * * * We deny the power of the Legislature to do this, to brand as an offense that which the Constitution designates and declares to be a right, and therefore an innocent act; and consequently we hold that the statute which professes to exert such a power is nothing more nor less than a legislative judgment, and an attempt to deprive all who are included within its terms of a constitutional right without due process of law."

State vs. Julow, 129 Mo. 163, s. c., 31 S. W. Rep. 781, (1895).

10. In a case involving the constitutionality of an Arkansas statute, providing that when any person or company engage in the operation or construction of a railroad, or any contractor or sub-contractor of such person or company, should discharge an employee, the wages of such employee should immediately become due, the Supreme Court considered, in an elaborate review of the authorities, the extent to which a Legislature may interfere with the making of private contracts. Among other things, the Court said:

"*When the subject of contract is purely and exclusively private, unaffected by any public interest or duty to persons, to society, or government, and the parties are capable of contracting, their is no condition existing upon which the Legislature can interfere for the purpose of prohibiting the contract or controlling the terms.*"

The Act was, therefore, held to be unconstitutional as to persons other than corporations, but as to corporations was held valid on the ground that by constitutional provision, the Legisla-

ture was vested with authority to annul their charters, and the Act operated only as a charter amendment.

Leep vs. St. Louis, etc., Ry. Co., 58 Ark 407, s. c., 23 L. R. A., 264.

11. A Rhode Island statute requiring corporations to pay the wages of their employees weekly was not in conflict with the Fourteenth Amendment, because: first, corporations were not embraced in the word "person" as used in said amendment, and, second, the Legislature had the power to amend the charters of corporations of that state.

State vs. Brown & Sharp M'f'g Co., 18 R. I.——, s. c., 17 L. R. A., 856.

On the first point the Court was of course clearly wrong.

12. So a similar Maryland statute was held constitutional as to corporations on the ground that such an Act was not an improper exercise of the legislative power to make charter amendments.

Shaffer vs. Union M. Co., 55 Md., 74.

13. While the Supreme Court of Massachusetts rendered an opinion to the Legislature that it was within its constitutional power to extend the application of the law relative to the weekly payment of wages by corporations to private individuals and partnerships, yet it is to be noted that in their opinion the Supreme Court apparently considered the question only with reference to the Massachusetts Constitution which grants more comprehensive power to the Legislature than is found in most state constitutions, and expressly extends such power to "all manner of wholesome and reasonable orders, laws, statutes and ordinances" and does not in terms make any provisions as to freedom or liberty of contract, and the question was not discussed with reference to the effect of the Fourteenth Amendment of the Constitution of the United States.

Re House Bill 1230, 163 Mass., 587; s. c. 28 L. R. A., 344 (1895).

14. An Act of the Legislature of Massachusetts forbidding an employer to impose a fine upon or to withhold wages from an employee for any imperfections in weaving was held by the Supreme Court of Massachusetts to be a violation of the constitutional provision which enumerated under the natural and inalien-

able rights of man the rights of acquiring, possessing and protecting property. The Court said:

"The right to acquire, possess and protect property, includes the right to make reasonable contracts, which shall be under the protection of the law. * * * * * * The right to employ weavers and to make proper contracts with them is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them or impair the obligation of them, violates fundamental principles of the rights which are expressly recognized in our constitution."

Commonwealth vs. Perry, 155 Mass., 117; s. c. 14 L. R. A., 325 (1891).

15. An Act of the Legislature of Illinois providing that no females shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, was held unconstitutional by the Court on the grounds: 1st, of its partiality; 2nd, that it arbitrarily restricted the employer and the employee and deprived them of both a liberty and a property right without due process of law. The Court in delivering its opinion said:

"But aside from its partial and discriminating character, this enactment is a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties. It substitutes the judgment of the Legislature for the judgment of the employer and employee in a matter about which they are competent to agree with each other. It assumes to dictate to what extent the capacity of labor may be exercised by the employee and takes away the right of private judgment as to the amount and duration of the labor to be put forth in a specified period. Where the Legislature thus undertakes to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, it transcends the authority intrusted to it by the constitution, even though it imposes the same burden upon all other citizens or classes of citizens. *General laws may be as tyrannical as partial laws.* A distinguished writer upon constitutional limitations has said that general rules may sometimes be as obnoxious as special if they operate to deprive individual citizens of vested rights, and that, while every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, *the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be*

under a rule impartial in its operation. Cooley, Const. Lim., 5th Edition, top p. 434, 435."

Ritchie vs. People, 154 Ill. 98; s. c. 29 L. R. A. 79, at 83, (1893).

16. A municipal ordinance making it a misdemeanor for any contractor with the city to contract for more than eight hours labor a day from any one person, was held by the Supreme Court of California to be unconstitutional and void, as "a direct infringement of the right to such persons to make and enforce their contracts."

In re Kubach, 85 Cal. 274; s. c. 9 L. R. A., 482, (1890.)

17. An Act of the Nebraska Legislature providing that for all classes of laborers except those engaged in farm or domestic labor, a day's work should not exceed eight hours, was held unconstitutional by the Supreme Court of Nebraska on two grounds: 1st, as special legislation against farm and domestic laborers; 2nd, as denying to the parties the constitutional right to contract with reference to compensation for services. The Court in delivering its opinion said:

"The legislation attempted cannot be defended as a police regulation, as was attempted in argument; for under pretense of the exercise of that power the Legislature cannot prohibit harmless acts which do not concern the health, safety and welfare of society."

Lowe vs. Reese Printing Co., 41 Neb. 127; s. c. 24 L. R. A., 702, (1894.)

18. A Massachusetts statute prohibiting all persons under the age of eighteen, and all women from laboring in any manufacturing establishment, more than sixty hours a week was held valid under the Constitution of that State as a health or police regulation.

Commonwealth vs. Hamilton Mfg. Co., 120 Mass., 383 (1876).

19. A Kansas statute providing that where miners were employed at the ton or other quantity rates, the output should not be passed over any screen before the same had been weighed and credited to the miner, was held constitutional as an Act regulating weights and measures for the purpose of furnishing statistical records of the coal trade, and on the express ground that

when properly construed it did not require payment of wages to be made on the basis of the screened product, or in any way affect the right of contract between employer and employee, or prevent them from making such agreement as they chose as to the basis of compensation, the reasoning of the Court being based on the assumption that if, properly construed, it would have had the effect of abridging the freedom of contract and regulate the payment of wages, it would have been unconstitutional. Smith, J., indeed dissented upon the precise ground that the Act did bear this construction and was hence an unconstitutional regulation of the right of contract not justified by any public necessity. This case therefore is, in fact, an authority in support of the proposition that a screen statute passed to regulate wages is unconstitutional.

State vs. Wilson, Sup. Ct. of Kansas, (1899); 47 L. R. A., 71.

20. In response to an inquiry from the Colorado House of Representatives as to the constitutionality of a bill constituting eight hours a legal day's work in mines, factories and smelters, the Supreme Court of Colorado replied that it was not competent for the Legislature to impose especial restrictions upon the mining, manufacturing and smelting industries of the State, and that the Act "violated the right of parties to make their own contracts,—a right guaranteed by our bill of rights."

Re Eight Hour Bill, 21 Colo., 29, s. c., 39 Pac. Rep. 328.

21. Subsequently in answer to an inquiry as to the power of the Legislature to pass a "coal-screening bill," this legislation was likewise condemned by the Supreme Court of Colorado, as hostile to the Constitution of the State.

Re House Bill No. 202, 21 Colo. 27; s. c., 39 Pac. Rep. 431.

22. Under the Constitution of Utah it is made mandatory upon the Legislature to pass laws to provide for the health and the safety of the employees in factories, smelters and mines. An Act was passed by the Legislature making the period of employment of workmen in underground mines, smelters and refineries, eight hours per day, except in cases of emergency, and making a violation of the statute a misdemeanor. It was held by the Su-

preme Court of Utah, in three cases, that this law was constitutional, both as to underground mines and as to smelters.

Holden vs. Hardy, 14 Utah, 71; s. c., 37 L. R. A. 103. State vs. Holden, 14 Utah, 93; s. c., 37 L. R. A., 108. Short vs. Bullion &c., Mining Co., (Utah,) 45 L. R. A., 603.

23. The first of these cases, relating to the employment in underground mines, was carried to the Supreme Court of the United States, and was there held by a majority opinion, Mr. Justice Brewer and Mr. Justice Peckham dissenting, to be constitutional as a valid exercise of the police power of the State, on the specific ground that there is reasonable ground for belief that underground mining, when too long performed, is injurious to the health, but the Court reaffirmed in its opinion the general principle that the right to make proper contracts is protected by the Fourteenth Amendment, and did not assert the constitutionality of eight-hour laws in general; on the contrary, as above shown, specifically stating in the opinion that the Court had "*no disposition to criticize the many authorities which hold that State statutes protecting the hours of labor are unconstitutional.*"

Holden vs. Hardy, 169 U. S., 366.

24. At a later date a similar statute of the State of Colorado, limiting employment in underground mines, smelters and ore refineries to eight hours per day was held unconstitutional by the Supreme Court of Colorado, as being in violation of a provision of the Colorado Constitution, guaranteeing liberty and the right to acquire, possess and protect property.

Re Morgan, Sup. Ct. of Colorado, July 17, 1899, 47 L. R. A., 52.

25. A statute of the State of Washington forbidding the employment of women in any saloon or other place where intoxicating liquors were sold, was held to be a valid exercise of the police power of the State and constitutional.

In re Considine, 83 Fed. Rep., 157.

26. A statute of Ohio prohibiting the making of a voluntary contract between a railroad company and its employee, whereby the latter agrees, in consideration of certain benefits from the company, that if he elects to accept benefits when injured, he

will not look to the company for damages for the injury, was held unconstitutional.

Cox vs. Pittsburgh, &c. Ry. Co., 10 Ohio N. P. (Com. P), 213.

27. A statute passed by the Legislature of California, requiring all corporations doing business in the State to pay their employees, at least once a month, wages earned during the preceding month, and declaring that a violation of such requirements shall entitle an employe to a lien for his wages on the corporation's property, taking precedence of all other liens, except recorded mortgages or deeds of trust, and that such employe shall be entitled to an attachment and a reasonable attorney's fee in case of suit to collect such wages or enforce such lien, and that an unrecorded deed shall be no defence to such suit, was held constitutional by United States Circuit Judge Morrow.

Skinner vs. Garnett Gold Mining Co., 96 Fed. Rep., 735.

28. Subsequently this same statute was held unconstitutional by the Supreme Court of California on the ground that it denied corporations equal protection of the laws, and also on the broad ground of interference with the right of contract. Cooper, J., delivering the opinion of the Court, and referring to the provision of the Act in regard to monthly payment of wages and to another provision of the Act forbidding the payment of wages in anything except checks, said:

"The corporation and the laborer are prohibited from making any contract whereby wages are to become due for a longer period than one month as a condition of employment, or by which the laborer is to be paid in any thing except money or negotiable checks. The working man of intelligence is treated as an imbecile. Being over 21 years of age, and not a lunatic or insane, he is deprived of the right to make a contract as to the time when his wages shall become due. Being of sound mind and knowing the value of a horse, he is not allowed to make an agreement with the corporation that he will work 60 days and take the horse in payment. Business might be such that a corporation could not possibly pay wages without getting laborers who were willing to wait for their wages until the corporation could get money with which to pay them by marketing its products. The laborer might be interested in the corporation, or for some reason willing to wait until the corporation could pay him. Yet the parties being able to contract and willing to con-

tract, and desiring for the good of each other to contract, are by this statute forbidden to do so. * * * * * We might enumerate many other infirmities in the Statute, but above are sufficient to destroy it."

Johnson vs. Goodyear Min. Co., (Cal.), Nov. 1899, 59 Pac. Rep., 304.

29. So, very recently, an Illinois statute of 1897, providing that miners should be paid for all coal mined "at such prices as might be agreed on between the respective parties," was held not to prohibit a mine-owner from contracting with his employee to pay only for the lump coal screened, or to prevent in any way any contract for the payment of compensation by a different method or upon a different basis than that specified in the Act, and the Act was hence held constitutional. *Cartwright, J.*, delivering the opinion of the Court, reviewed and reaffirmed the doctrine of *Millett vs. People*, *Fraver vs. People*, *Ramsey vs. People* and *Harding vs. People*, protecting the right of contract between employer and employee from legislative infringement, and said that it was evidently the legislative intention to avoid the objectionable provisions of the former enactment "*by making contracts enforceable according to their terms, instead of attempting to make contracts for the parties*," and concluded thus:

"To hold otherwise would be to render the enactment unconstitutional. *It has been uniformly decided that a laborer cannot be deprived of the right to make his own contracts and exercise his own judgment as to how much he will receive for his labor and what he will receive as payment.*"

Whitebreast Fuel Co. vs. People (Ill)., 51 N. E., 853.

30. The statute of Pennsylvania making it unlawful for mine owners employing miners at bushel or ton rates to screen the output before being weighed and credited to the miner, was held by the Superior Court to be unconstitutional as a violation of the provision of the Pennsylvania constitution that no one should be deprived of his liberty or property except by the law of the land. Rice, J., said:

"Not only is the right of property protected against arbitrary enactments by the Legislature, but also the right of contract necessarily involved in it. *The general rule is that private parties able to contract and willing to contract may freely make such contracts concerning their property or labor not contrary to good morals or public policy as they may deem for their best*

interests: the instances when the Legislature may interfere to abridge or deny this valuable right are exceptional, and such interferences must have some reason for their justification other than the mere judgment of the Legislature that the contract is not for the best interests of one or the other of the parties to it."

Commonwealth vs. Brown, 43 Week. Notes Cases 59, (1898).

To summarize: It will thus be seen that in the foregoing thirty cases in which State statutes, restricting the freedom of contract between employer and employee, and the right of contract between them have been considered by the Courts, the result has been as follows:

Statutes requiring the furnishing of scales upon which to weigh coal have been held unconstitutional by the Supreme Courts of Illinois and Colorado.

A statute forbidding employers to be interested in the furnishing of supplies to employees has been held unconstitutional by the Supreme Court of Illinois.

Statutes requiring coal to be weighed before screening, for the purpose of computing miners' wages, have been held unconstitutional by the Supreme Courts of Illinois and Colorado, and the Superior Courts of Pennsylvania, while other screen statutes have been upheld by the Supreme Courts of Illinois and Kansas on the specific ground that when properly construed they were not intended to regulate the payment of wages and did not prevent the making of contracts in regard thereto.

Statutes and a municipal ordinance limiting the hours of employment to eight hours per day have been held unconstitutional by the Supreme Courts of Illinois, Nebraska, California and Colorado, and the only case in which an eight hour labor law has been upheld being the Utah statute in reference to labor in underground mines, which was held constitutional by the Supreme Court of Utah and the Supreme Court of the United States on the specific ground of the injury to the health of the miners.

A statute regulating the employment of women and children in factories has been upheld by the Supreme Court of Massachusetts as a proper health regulation.

A statute forbidding the employment of women in saloons has been upheld by the United States Circuit Court.

A statute requiring weekly payment of wages has been held

unconstitutional by the Supreme Court of Illinois, and a proposed statute of this character declared by the Supreme Court of Massachusetts to be not in conflict with the broad constitution of that particular state.

A statute regulating compromises of claims between railroad companies and their employers has been held unconstitutional by the Common Pleas Court of Ohio.

A statute requiring the monthly payment of wages has been held unconstitutional by the District Court of Pennsylvania.

A statute requiring all corporations to pay their employees monthly has been declared constitutional by a United States Circuit Court, and later unconstitutional by the Supreme Court of California.

The overwhelming tendency of the decisions, therefore, is to hold as unconstitutional and void the repeated attempts of the Legislature to restrict the right of contract between employer and employee, and such legislation has, in fact, been upheld only in the matter of health.

It will also be seen that the unconstitutionality of such paternal legislation has been emphatically denied by the courts of Illinois, Pennsylvania, West Virginia, Nebraska, Massachusetts, California, Colorado, Kansas, Missouri, and has been affirmed by none except in matters of health, unless with the exception of the ex-parte opinion of the Supreme Court of Massachusetts above referred to, and the decisions of Arkansas, Maryland and Rhode Island upholding the validity of such legislation as applied to corporations only.

A statute forbidding the fining of employes for imperfect work has been held unconstitutional by the Supreme Court of Massachusetts.

A statute forbidding employers from selling goods to their employees at a greater profit than to other customers, has been held unconstitutional by the Supreme Court of West Virginia.

A statute forbidding employers to prohibit employees from joining labor unions has been held unconstitutional by the Supreme Court of Missouri.

A statute requiring employers to immediately pay the wages of discharged employees has been held unconstitutional by the Supreme Court of Arkansas, as to all persons except corporations.

Statutes requiring corporations to pay their employees weekly have been held constitutional by the Supreme Courts of Rhode Island and Maryland solely on the ground that the Legislature had the power to amend charters of corporations.

Manifestly the doctrine of the Arkansas, Rhode Island and Maryland Courts drawing a distinction between corporations and other employers has no application to the case at bar for two reasons:

1st. The Act is made to apply to all persons, both natural and corporate, and cannot be held unconstitutional as to a part of the persons named therein, and valid as to others;

Allgeyer vs. Louisiana, 165 U. S., 578.
Bank vs. Divine Grocery Co., 13 Pickle, 603.

2nd. The complainant having been incorporated February 18, 1863, under a special charter for a term of *ninety-nine years*, and the Legislature having reserved no right to repeal or amend its charter, the doctrine of the Arkansas, Rhode Island and Maryland cases could in no event be applied as against it.

Record, p. 30

It will be noted that in some of the foregoing cases the legislation in question applied only to certain classes of labor, and in one or two cases the unconstitutionality of the statutes was rested upon this ground; but it will also be seen that in the great majority of the cases, the opinion of the Court was based upon the broad principle contended for in the case at bar that the legislation in question was an arbitrary and unjustifiable interference on the part of the Legislature with the right of contract between an employer and employee, the opinion in the majority of the cases being rested squarely upon this proposition, either as one of the grounds of decision or as the only ground.

In accordance with the foregoing consensus of authority is the opinion expressed in Tiedeman's Police Power in the chapter entitled "Police Regulation of the Relation of Master and Servant."

"Between adults, employer or employed, since all men are free and equal, and are entitled to the equal protection of the law, neither party can be compelled to enter into business relations with the other, except upon his own terms, voluntarily and free from any coercion whatsoever. The State has no right to interfere in a private employment and stipulate the terms upon

which the services are to be rendered * * * .

* * * As soon as the law places one for any just reason under a disability, or gives to another a privilege not enjoyed in common by all, protection from oppression becomes a duty of the State, so far as the disability or its cause, or the grant of the privilege, produces or renders the oppression possible. The law can only guarantee to men on a legal plane of equality, protection against trespasses upon their rights. To place the working classes under special protection against the aggression of capital, beyond the careful and strict enforcement of their rights; to compel the employer to pay the rate of wages, determined by the State to be equitable, is to change the government from a government of freemen to a paternal government, or a despotism, which is the same thing.

"But even if this reasoning should not be sufficient to prove the unconstitutionality of State interference in the relation of master and servant, the very futility of such interference would at least cast a doubt upon its constitutionality. *Law can never create social forces. On the contrary, law is the resultant of the social forces.* If the social forces at work at any given time produce an inequality in the material conditions of classes of society and give rise to the oppression of one class by another; if the inferior class is not naturally strong enough to resist the oppression, when free from legal restraints, no law can afford it protection. For how can the workingman secure the enforcement of a law made for his protection, when the protection of the State is required, because his needs and the necessities of his family compel him to submit to the unrighteous exactions of the capitalist. Will not the same needs and necessities force him to place by his vote men in the various State offices whose antipathy to his interests will make the law a dead letter, if not secure its repeal?

"In England, where suffrage is limited, such a law is somewhat reasonable, because those for whose benefit it was enacted are under legal disability. But in this country where suffrage is universal, and the wage earners constitute a vast majority of the voters, if they are unable to assert their claims without the aid of law, they cannot do so with its aid. And thus their inefficacy confirms the unconstitutionality of laws, which are designed to protect the workingman against the oppression of the employer. *Laws, therefore, which are designed to regulate the terms of hiring in strictly private employments, are unconstitutional, because they operate as an interference with one's natural liberty, in a case in which there is no trespass upon private right, and no threatening injury to the public. And this conclusion not only applies to laws regulating the rate of wages of private workmen, but also any other law, whose object is to regulate any of the terms of hiring, such as the number of hours of labor per day, which the employer may demand. There can be no*

constitutional interference by the State in the private relation of master and servant except for the purpose of preventing frauds and trespasses."

Tiedman's Limitations of Police Powers, Sec. 178.

Third. The attempts of the Legislature in other analagous cases to deprive individuals of liberty and property under the guise of the police power, have likewise been uniformly held unconstitutional by the Courts.

The following cases among others establish this proposition:

1. An Act of the New York Legislature declaring it a misdemeanor to manufacture cigars or tobacco on any floor of a tenement house, if such floor was occupied as a home or residence, was held by the Supreme Court of New York to deprive individuals of the liberty guaranteed them by the constitution, and to be unconstitutional.

In re Jacobs, 98 N. Y., 98; S. C. 50 Am. Dec., 636.

2. An Act of the New York Legislature prohibiting the manufacture or sale for food of any substitute for butter or cheese was held by the Supreme Court of New York to be likewise unconstitutional for the same reason.

People vs. Marx, 98 N. Y., 377; S. C. 52 Am. Rep., 34.

3. A New York statute prohibiting any person selling any article of food from giving any other article as a prize or premium to the purchaser, was held by the Supreme Court of New York to be unconstitutional and void as an infringement upon the liberty of the seller. Peckham, J., in delivering the opinion of the Court, refers to the foregoing case of *in re* Jacobs as "authority for the statement that the Legislature cannot, without reason, and arbitrarily, infringe upon the liberty or the property rights of any person within the protection of the constitution of this State; and that if the Legislature shall determine what is a proper exercise of its police power, its decision is subject to the scrutiny of the Courts. * * * * As is also said in the last case, it is generally for the Legislature to determine what laws and regulations are needed to protect the public health and serve the public comfort and safety, and if its measures are calculated, intended, convenient, or appropriate to accomplish such ends, an exercise of its discretion is not the subject of judicial review. But those measures must have some relation to these ends. Courts

must be able to see, upon a perusal of the enactment, that there is some fair, just, and reasonable connection between it and the ends above mentioned. Unless such relation exists the enactment cannot be upheld as an exercise of the police power."

People vs. Gillson, 109 New York, 389.

4. Likewise the Supreme Court of Tennessee has held unconstitutional the Act of 1895, by which all transfer of property to prefer creditors, or that would have that effect, whether made by a solvent or an insolvent debtor were forbidden, Chief Justice Snodgrass, in delivering the opinion of the Court, saying:

"These general provisions in respect to the right to own property, equally protect the right to use, enjoy, exchange and transmit it as held in the Morris case before referred to, and neither can be taken from the citizen by the arbitrary enactment of the Legislature. That the citizen can be restrained from any improper use or improper disposition of his property is not doubted, and is, of course, not asserted here, but such is not the effect of this Act, or if the purpose of the Legislature was to accomplish this result, they have attempted it by means of legislation beyond their power to adopt."

Bank vs. Divine Grocery Co., 13 Pickle (Tenn.), 603, at 612.

5. An ordinance of the city of San Francisco, which made it unlawful for any one to carry on a laundry without the consent of a Board of Supervisors except in a building constructed of brick or stone, and left it to the arbitrary will of the Board to determine to whom such consent should be given, was held unconstitutional by the Supreme Court of the United States.

Yick Wo vs. Hopkins, 118 U. S., 356.

6. An Act of the Legislature of Louisiana, providing that "any firm, person or corporation who shall fill up, sign or issue, in this State, any certificate of insurance under an open marine policy, or in any manner whatever does any act in this State to effect for himself or for another, insurance on property then in this State, in any marine insurance company, which has not complied in all respects with the laws of this State, shall be subject to a fine of one thousand dollars," was held by the Supreme Court of the United States to be invalid as a violation of the Fourteenth Amendment.

Allgeyer vs. Louisiana, 165 U. S., 578.

7. Recently a New York statute prohibiting the sale of rail-

way tickets by any person not an agent of the carrier and designed to prevent the sale of tickets by brokers, was held unconstitutional by the New York Court of Appeals as an unlawful restraint upon individual liberty, not maintainable as an exercise of the police power of the State. Parker, C. J., delivering the opinion of the Court said of the police power of the State that:

"However broad and extensive, (it) is not above the constitution, in obedience to the commands of which the Courts will protect the rights of individuals from invasion under the guise of police regulations, when it is manifest that such is not the object and purpose of the regulation; and, while it is the general province of the Legislature to determine what laws and regulations are needed to protect the public health, comfort, and safety, Courts must be able to say, upon a perusal of the enactment, that there is some fair and reasonable connection between it and the ends above mentioned. Unless such relation exists, an enactment cannot be upheld as an exercise of the police power."

People vs. Warden, (N. Y.), 51 N. E., 1006 (1898).

These cases serve as a further illustration of the proposition that each and every arbitrary interference by the Legislature with the liberty or property of the invidual is subject to review by the Courts and is unconstitutional and void.

It is believed that in no case have the Courts sustained the validity of Acts of this character except upon some ground which did not involve the power of the Legislature to interfere with the rights of individuals to voluntarily enter into contracts as guaranteed by the Fourteenth Amendment.

Applying to the case at bar the principles deduced from all the authorities heretofore cited, it is evident that the Act of 1899 as construed by the Supreme Court of Tennessee, is not a legitimate exercise of the police powers of the State, and is in conflict with the Fourteenth Amendment.

Conceding every proper presumption in favor of the validity of legislation, giving to the statute on trial the benefit of every reasonable doubt, yet it cannot be made to appear that this legislation has any substantial relation to the public welfare, or that there is any reasonable ground for believing it to be necessary for the good of the community.

It is clear that under the authorities above cited, to justify such legislation as a legitimate exercise of the police power it

must be the public welfare that is at stake, and not merely the financial welfare of a particular class, as for example laborers or employers. But it may be safely asserted that not only has this legislation no substantial relation to the welfare of the community at large, but that there is not a scintilla of evidence or matter within judicial notice from which it may be reasonably inferred, that in any substantial sense it is necessary to the welfare of the laborers themselves, or will conduce in any respect to their well-being. On the contrary, if enforced, its only result will be to deprive laborers generally of the convenience which they now enjoy of anticipating the monthly payment of their wages, and to work especial hardship upon the families of the improvident.

The Act in question is a useless interference on the part of the Legislature with the right of contract between persons who are *sui juris*, and not justified by any substantial relation to the welfare of society. It does not contain a single element which has been considered by the Courts as a justification of legislative interference with the right of contract, and is a mere arbitrary enactment in the guise of protecting the public interest.

It is earnestly insisted that the Act of 1899 is not valid as an exercise of the police-power of the State, that it is in conflict with the Fourteenth Amendment of the Constitution of the United States, and that for the foregoing reasons the Supreme Court of Tennessee erred in rendering a decree against the Plaintiff in error for the money value of the orders and the costs of the cause, and that Defendant's bill should be dismissed at his cost.

C. E. LUCKY,
Solicitor for Plaintiff in Error.

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of Counsel.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 174.

THE KNOXVILLE IRON COMPANY, PLAINTIFF IN ERROR,

vs.

SAMUEL HARBISON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

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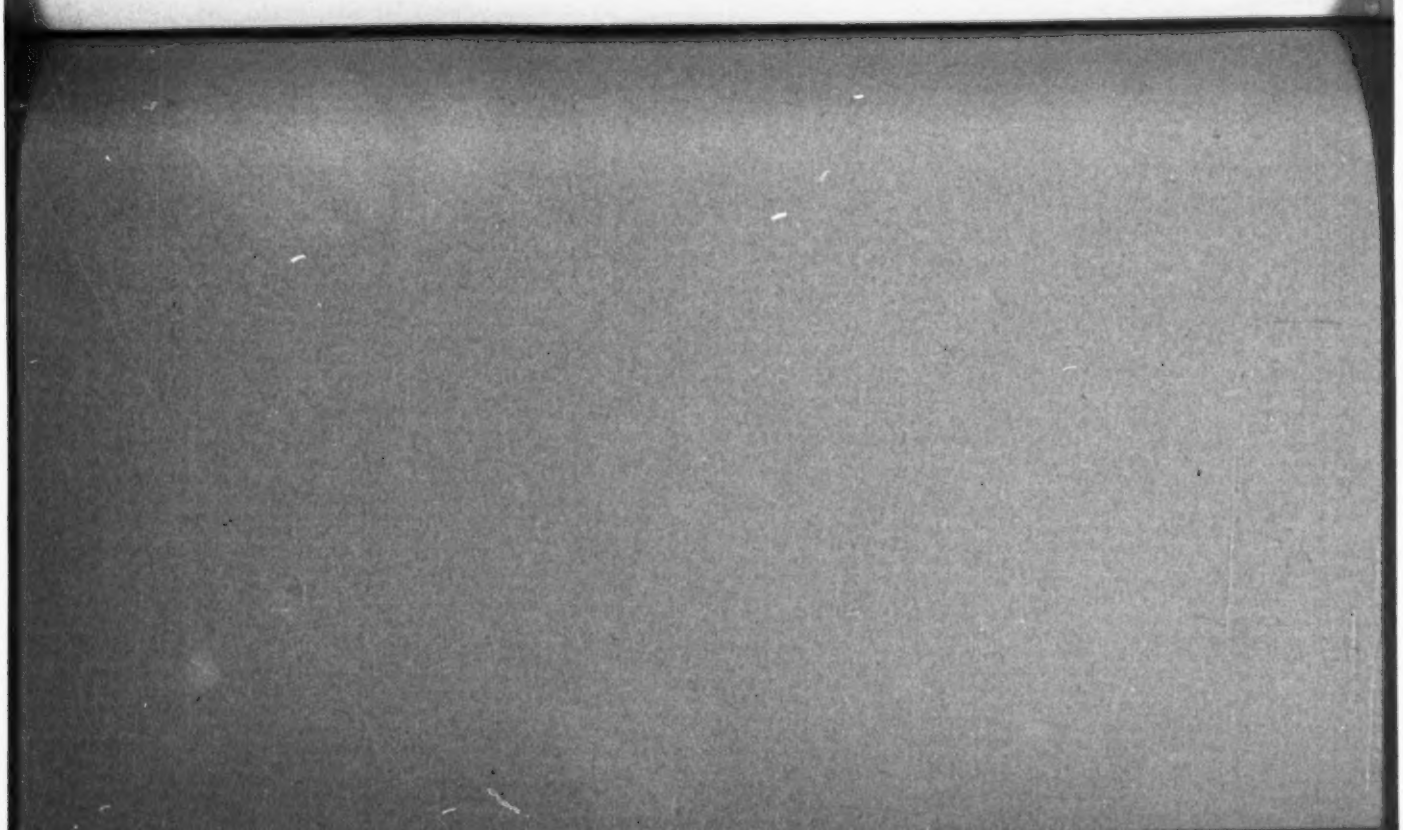

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vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Supplemental Brief for Plaintiff in Error.

It is respectfully submitted that the arguments contained in the reply brief for the defendant in error are not well taken for the following reasons:

1.

A State statute is not necessarily in accord with the fourteenth amendment, as suggested in the reply brief, merely because it provides for a regular course of procedure through courts of justice, giving the parties sufficient notice and adequate opportunity to defend.

If the statute itself transcends the legitimate authority of the State and attempts to interfere with the property or liberties of individuals beyond the proper police power of the State, the statute is, for this reason, not due process of law and is repugnant to the fourteenth amendment.

Thus, in *Allgeyer vs. Louisiana*, in which a Louisiana statute imposing a fine on any person obtaining insurance in a marine insurance company that had not complied with the laws of the State was held to be repugnant to the fourteenth amendment, Mr. Justice Peckham, delivering the opinion of the court, said:

"We think the statute is in violation of the fourteenth amendment of the Federal Constitution in that it deprives the defendants of their liberty without due process of law. *The statute which forbids such act does not become due process of law because it is inconsistent with the provisions of the Constitution of the United States.*"

Allgeyer *vs.* Louisiana, 165 U. S., 578.

So, in the case of *Holden vs. Hardy*, Mr. Justice Brown, delivering the opinion of the court, recognizes that State legislation may constitute a deprivation of liberty or property without due process of law upon three grounds: First, that it unjustly discriminates as respects a particular individual or class of individuals as distinct from the rest of the community; second, that it constitutes such a change in the general system of the jurisprudence of the State as to abolish certain immutable principles of justice inherent in the very idea of free government, such as that no man shall be condemned in person or property without due notice and opportunity to defend; and, third where the State legislature transcends its proper police power in assuming to legislate for the health or morals of the community (in other words, where from the want of authority in the legislature the act itself, under the doctrine in the Allgeyer case, does not constitute due process of law). In this opinion Mr. Justice Brown said:

"Recognizing the difficulty in defining, with exactness, the phrase 'due process of law,' it is certain that these words imply a conformity with natural and inherent principles of justice, and forbid that one man's property or right to property, shall be taken for the benefit of another, or for the benefit of the State, without compensation, and that no one shall be condemned in person or property without an opportunity of being heard in his own defense."

"As the possession of property, of which a person cannot be deprived, doubtless implies that such property may be acquired, it is safe to say that a State law, which undertakes to deprive any class of persons of the general power to acquire property, would also be obnoxious to the same provision. Indeed we may go a step further, and say that as property can only be legally acquired as between living persons by contract, that a general prohibition against entering into contracts with respect to property or having as their object the acquisition of property, would be equally invalid."

Holden *vs.* Hardy, 169 U. S., 367.

2.

The cases of *Orient Insurance Co. vs. Daggs*, 172 U. S., 557, and *Dugger vs. Insurance Co.*, 95 Tenn., 250, are clearly distinguishable for the reason that the peculiar and universal nature of the contract of insurance affects it with a public interest which makes it, under an established public policy, peculiarly the subject of legislative regulation, especially legislation of the character in question, designed to prevent fraud on the part of insurance companies in collecting premiums on one valuation and paying on a lower.

In *Orient Insurance Company vs. Daggs* it was held, in a suit between a citizen of the State of Missouri and a foreign corporation, that a Missouri statute compelling fire insurance companies in cases of total loss to pay the amount for which the property was insured, less subsequent depreciation, did not deprive the insurers of property without due process of law, as it left the parties to fix the valuation of the property as they chose, but only ascribed estoppel to their acts

after this was done and made their action in the matter of valuation conclusive. The opinion of Mr. Justice McKenna was further based partly on the proposition that the State had a right to attach this condition to the doing of business by corporations of its own creation, and had an equal right to impose such condition upon foreign corporations admitted into the State to do business, the statute having been held by the supreme court of Missouri to be made such a condition upon such foreign corporations.

In *Dugger vs. Insurance Company*, in which a Tennessee statute making void the stipulations in insurance policies limiting liability to less than the full amount of loss was held constitutional, the opinion of the court, so far as it relates to the conflict of the act with the fourteenth amendment, rested entirely upon the doctrine that the act was valid as applied to the complainant, a foreign corporation, as an act prescribing the terms on which foreign corporations should come within its borders and carry on business with its citizens, and so far as it related to the declaration of rights of the constitution of Tennessee the validity of the act, as a legitimate exercise of the police power of the State, is based almost entirely upon the established public policy of regulating the stipulations of insurance policies and the long line of cases upholding such regulations. Among other cases cited by Judge Beard in the opinion is the Pennsylvania case of Commonwealth *vs.* Vrooman, 25 L. R. A., 250, in which an act confining the issuance of fire-insurance policies exclusively to corporations was held to be constitutional upon the specific ground, among others, that "the business of insurance against loss by fire is by reason of its magnitude, its importance to property-owners, and the nature of the business, a proper subject for the exercise of the police power of the State," this case being referred to by Judge Beard "to show how far the State's power to interfere in insurance contracts has been pressed by the court of highest respectability."

It is to be noted in this connection that while the courts of Pennsylvania have held this regulation of insurance policies to be a legitimate exercise of the police power of the State on account of the public nature of the business, they have likewise uniformly held legislation interfering with the right of contract between employer and employé, either by requiring the payment of wages in money or otherwise, to be an unauthorized exercise of legislative power and void. These several Pennsylvania decisions show conclusively that the regulation of insurance policies is in an entirely different category from the regulation of contracts between employers and employés, and that a decision in reference to the one has practically no bearing upon a question relating to the regulation of the other.

It is respectfully insisted that the insurance cases are distinguishable from the case at bar on the ground of the peculiar nature of the insurance contracts, and that they are more nearly analogous to the Grainger cases and other cases, in which it has been held that the State, in the exercise of its police power, may not only regulate the charges of common carriers, but may regulate the charge for storing of grain in bulk in warehouses as a business "affected with a public interest."

Munn *vs.* Illinois, 94 U. S., 113.
People *vs.* Budd, 117 N. Y., 1.

The underlying principle upholding the regulation of insurance contracts is the magnitude of the business and its importance to the community at large, affecting, as it does, practically all classes of people and well nigh every citizen in the community, and making it a legitimate subject for the exercise of the police power. This proposition is not disputed, but it manifestly has no application to legislation such as that now under consideration, abridging for no valid reason the right of contract between certain classes of the community only.

3.

The case of *Holden vs. Hardy*, 169 *U. S.*, 366, is, as already shown, clearly distinguishable from the case at bar. The specific ground upon which the decision in that case is based, as appears from the opinion of Mr. Justice Brown, is that the police power "may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances;" that the legislature may unquestionably establish reasonable police regulations for the protection of the lives of its citizens; that similar regulations may also be adopted for the protection of their health and morals, it being "as much for the interest of the State that the public health should be protected as that life should be made secure;" and that the act in question, being specifically limited to employment in underground mines, smelters, and refineries, might be sustained as a valid exercise of the police power of the State, there being reasonable grounds for believing in the correctness of the legislative judgment that these employments when too long pursued are detrimental to the health of the employés.

The court reaffirmed in its opinion the general principle that the right to make proper contracts is protected by the fourteenth amendment, and specifically stated that it had "no disposition to criticise the many authorities which hold that State statutes protecting the hours of labor are unconstitutional."

This case does not lay down the broad proposition insisted upon in the reply brief that the mere fact that the parties do not stand upon an equality gives the legislature *ipso facto* authority to regulate their mutual dealings so as to put them on an equality, but only held the argument that the legislature could not interfere in the contracts of persons *sui juris* in matters affecting their health to be unsound, for the reason that in their deal-

ings in this matter the employés did not stand upon an equality with the employer, Mr. Justice Brown in this connection using the words cited in the reply brief, "But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere when the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself."

In other words, the case is not based upon the doctrine that the mere fact that the parties do not stand on an equality will of itself justify the interference, but incidentally asserts the negative doctrine that when the health, morals, or other consideration of public welfare demands the interference in the relationship of employer and employé, the mere fact that the parties are *sui juris* will not render such interference unlawful, since the parties do not stand on an equality.

4.

The case of *St. Louis, I. M. & S. R'y Co. vs. Paul*, 173 *U. S.*, 404, is not based upon the broad right of the legislature to regulate the right of contract. In this case an Arkansas statute, providing for the immediate payment of the unpaid wages due a discharged employé of any corporation or person engaged in operating or constructing a railroad, having been upheld by the supreme court of Arkansas as to corporations only, and as an amendment of corporate charters under the reserved power of the legislature, affirming the former case of Leep *vs.* St. Louis Railway Company, cited in the original brief, the opinion of the supreme court of Arkansas was affirmed by the Supreme Court of the United States upon the same ground.

The Arkansas constitution expressly provided that corporations might be formed under general laws which might be altered and repealed from time to time, and gave the legislature power to alter, revoke, or annul any charter when-

ever in their opinion it might be injurious to the citizens of the State, but in such manner as to do no injustice to the corporations. It was upon this specific ground, in connection with the public nature of the business involved, that the validity of the statute was upheld as to corporations. Mr. Chief Justice Fuller, delivering the opinion of the court, said:

"The contention is that as to railroad corporations organized prior to its passage, the act was void because in violation of the fourteenth amendment. Corporations are the creation of the State, endowed with such faculties as the State bestows and subject to such conditions as the State imposes, and if the power to modify their charters is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation; and as *this amendment rested on reasons deduced from the peculiar character of the business* of the *corporations affected and the public nature of their functions*, and applied to all alike, the equal protection of the law was not denied."

* * * * * * *

"*In view of the fact that these corporations were clothed with a public trust, and discharged duties of public consequence, affecting the community at large*, the supreme court [of Arkansas] held the regulation, as promoting the public interest in the protection of employés to the limited extent stated, to be properly within the power to amend reserved under the State constitution. Inasmuch as the right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the State, we do not think that conclusion in its application to the power to amend can be disputed on the ground of infraction of the fourteenth amendment."

The doctrine of this case clearly has no application to the case at bar, for the reason that, as shown in the original brief, The Knoxville Iron Company, plaintiff in error, was incorporated in 1868, under a special legislative charter, for the term of ninety-nine years, with no power of amendment

reserved to the legislature either in the charter or by general law.

Charter, Trans., p. 30.

5.

While the statutes of Tennessee make the findings of fact of the court of appeals conclusive and final (Acts of Tennessee, 1895, chapter 6), yet their conclusions of fact, in so far as they are sought to be relied on for the purpose of depriving the plaintiff in error of the opinion of this honorable court as to the constitutionality of the statute in question, are manifestly ineffective, it being well-settled law that the conclusions of the State court as to the constitutionality of a statute are not binding upon this honorable court. It is respectfully submitted that this doctrine extends not only to the fact of constitutionality or unconstitutionality as found by the State court, but to the facts upon which said opinion is based.

If it were otherwise, manifestly the right of bringing cases for review from the State court to the Supreme Court of the United States would often be practically cut off, since, if the State court found as a fact that the act was necessary for the protection of public health, public morals, and public welfare, and that it was reasonably adapted to these purposes, and if these findings of fact were binding, this would completely cut off all investigation or inquiry by this court, and would leave it powerless to set aside even an unconstitutional statute.

It is respectfully submitted that the findings of the court of appeals in this case as to what is termed a species of compulsion on the part of the plaintiff in error, arising out of the necessities or improvidence of its employés, and termed by said court a motive power practically depriving the employés of their freedom of choice as to the acceptance of coal orders, are not binding upon this court, which will look at the

facts in evidence, from which it appears that no such compulsion in fact exists, and that there is complete liberty on the part of the employés as to the acceptance of coal orders, the court of chancery appeals having itself found as a fact that *the defendant has never insisted upon its laborers giving any orders, and that the orders are a convenience to the employés* (pp. 66, 67).

The only witness on this point is the company's treasurer, Otis A. Brown, who testifies as follows :

"Q. State whether or not any employé of your company is ever requested to draw these orders.

"A. They are not.

"Q. State whether or not the drawing of these orders and presenting them to the company for acceptance is a voluntary act on their part.

"A. It is."

Trans., p. 21.

In any event, however, the question of compulsion or non-compulsion in this present case is, it is respectfully submitted, entirely immaterial, for the reason that the statute is broad in its terms, and its constitutionality does not depend upon the habit of dealings of this or any other particular company. Its validity or invalidity clearly cannot be determined by the question as to whether or not advantage is taken of employés by any particular employer, but its constitutionality must be determined upon the general question as to whether or not such legislation is lawful and whether or not there are reasons of public welfare requiring such general legislative interference with right of private contract between employer and employé.

6.

It is respectfully insisted that all the cases cited in the reply brief of the defendant in error fall within one or the other of those classes in which, as conceded in our original

brief, the exercise of the police power is well settled, and that none of the cases cited conflict with the propositions relied upon in the original brief, upon which it is submitted that the Tennessee statute of 1899 is unconstitutional.

The position of plaintiff in error in its original brief is misunderstood in the reply brief of defendant in error. It was not intended to be asserted in the original brief that health, morals, and safety are alone concerned in the exercise of the police power of the State, but it was expressly conceded that, under the doctrine of *Lawton vs. Steele* and numerous other decisions, the police power may extend to other matters affecting the general welfare of the community at large. However, it was insisted that, in respect to matters affecting the public welfare outside of the primary police duties, safety, health, and morals, interference by the State with the right of contract is, under the doctrine of *Lawton vs. Steele*, only justified when demanded by the public welfare and the well being of the community at large, as distinguished from the financial well being of a particular class, however large and meritorious that class may be.

None of the cases cited in the reply brief conflict with this proposition.

Thus the case of *Dent vs. West Virginia*, 1129 U. S., 114, upholding the right of the State to require certificates from the board of health as a prerequisite to the practice of medicine, comes clearly within the power of preserving the public health.

The case of *Douglass vs. Kentucky*, 168 U. S., 488, in reference to regulation of lotteries, comes with equal clearness within the power of preserving the public morals.

The laws regulating the contracts of married women, infants, and other persons not *sui juris* at common law, manifestly have no application to the case at bar, as the parties in such cases are not deprived by the legislature of any contract rights they formerly possessed, but their contract rights are, on the contrary, enlarged.

The laws making corporate stockholders liable for employés' wages are sustainable as proper conditions attached to the granting of corporate franchises.

The mechanics' lien laws likewise are not a regulation of the right of contract, as no such statute attempts to provide that such lien shall exist, whether the parties wish it or no, or to render invalid a contract made by the laborer waiving the benefit of such lien.

The essential feature of the case at bar is that the legislature attempts to read into the contract of employment certain features which even the parties cannot waive. This is not sought to be done either in the mechanics' lien laws or any other statutes cited in the reply brief, which merely prescribe the rights of the parties in the absence of agreement of the parties to the contrary.

In *Barbier vs. Connelly*, 113 U. S., 27, an ordinance of the city of San Francisco prohibiting the carrying on of public laundries from 10 o'clock at night until 6 o'clock in the morning, was held valid as a purely police regulation that might be justified as a necessary measure of protection in a city composed largely of wooden buildings, like San Francisco, and of whose necessity the municipal body was the judge. This was clearly a police regulation in a matter affecting the public safety, and illustrates the proposition contended for on page 14 of our original brief as to the large measure of discretion vested in the legislature in matters affecting the primary police duties, as distinct from more general and indefinite considerations of public welfare.

The doctrine of this case was furthermore strictly limited by the case of *Yick Wo vs. Hopkins*, 118 U. S., 356, in which an ordinance of the city of San Francisco, making it unlawful for any one to carry on a laundry without the consent of the board of supervisors, except in a building constructed of brick or stone, and leaving such consent to the arbitrary will of the board, was held unconstitutional.

In *Lawton vs. Steele*, 152 U. S., 133, a New York statute, prohibiting fishing with nets and declaring the same to be a nuisance and subject to summary abatement, was upheld as constitutional upon the ground of the immemorial right of the State, under its police power, to enact proper laws for the preservation of game and fish, in the general interest of the public, Mr. Justice Brown, in the opinion in this case, attaching the qualification above shown to the exercise of the police power for other than primary purposes, that when sought to be exercised for the general welfare it must be for the benefit of the community at large, as distinguished from that of a particular class.

In the case of Louisville & Nashville Railroad Co. *vs.* Kentucky, 161 U. S., 171, it was held that the State might lawfully prohibit the purchase or lease of parallel or competing lines of railroad or the consolidation of their stock, franchises, and property, such purchase, lease, or consolidation being contrary to public policy and inimical to the public interest, this case being based on the doctrine of *Munn vs. Illinois* as to the regulation of property "affected with a public interest." Mr. Justice Brown, delivering the opinion of the court, said:

"While the police power has been most frequently exercised with respect to matters which concern the public health, safety or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interest. In the case of *Munn vs. Illinois*, 94 U. S., 113, Mr. Chief Justice Waite said: 'Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use, but so long as he maintains the use, he must submit to the control.'"

In the case of *Davis vs. Massachusetts*, 167 U. S., 43, it was held that an ordinance of the city of Boston, passed in pursuance of legislative authority, prohibiting any person from making a public address on the Boston Commons without a permit from the mayor, was within the police power and not in violation of the fourteenth amendment, the case being rested in the opinion on the fact that the Common was public property, and that the city, under its delegated power from the legislature, had the right to make reasonable and proper regulations for its use by the public.

In the case of *Rideout vs. Knox*, 148 Mass., 368, the power of the legislature to declare a fence unnecessarily high and maliciously erected for the purpose of annoying adjacent proprietors a private nuisance was upheld as within the limits of the police power, on the ground that "it simply restrains the obnoxious use of the owner's premises; and, although the use is not directly injurious to the public at large, there is a public interest to restrain this kind of annoyance of one neighbor by another and to make a definite limit beyond which it is not lawful to go." Such restraint is manifestly in furtherance of the public peace, and such legislation is sustainable on that ground.

So the United States statutes regulating the rights of seamen are not applicable to the case at bar, seamen having from the beginning been regarded as peculiarly the wards of legislation and having their rights protected by maritime, commercial, and statute law, treating them as a class apart.

"Seamen are a class of men peculiarly in need of protection. The courts of maritime law not only extend to them a guardianship, but the codes of all commercial nations contain many provisions in their behalf. In *England* and the *United States* the subject is regulated almost entirely by statute."

21 Am. & Eng. Enc. Law (1st ed.), p. 915.

7.

While the statutes regulating the contract rate of interest for the use of money seem at first sight to be in conflict with our present contention, yet it is respectfully submitted that they furnish no real exception to the rule contended for, but are to be supported as a traditional policy of the race, rooted in abhorrence of usury from the earliest times, usury being prohibited by Mosaic law, condemned by the church under severest penalties, historically regarded as *malum in se*, and a crime at common law, and hence logically subject to legislative prohibition or restriction, the right of contract protected by the Constitution clearly not protecting contracts illegal at common law. It was furthermore regulated by statute of 37 Henry VIII, that became part of the common law of the United States:

"The Romans, through the greater part of their history, had the deepest abhorrence of usury. * * * But it is not only the civilized and commercial nations of modern Europe and the sage law-givers of ancient Rome that have regulated the interest of money. It will be deemed a little singular that the same voice against usury should have been raised in the laws of China, in the Hindoo institutes of Menu, in the Koran of Mahomet, and, perhaps we may say, in the laws of all nations that we know of, whether Greek or barbarian."

Kent, Ch., in Dunham *vs.* Gould, 16 John. (N. Y.), 367.

"Usury was an offense at common law, and the usurer was not only punished by the censures of the church in his lifetime, but was denied a Christian burial; and by the laws of Alfred the Great and Edward the Confessor, if, after death even, a man was found to have been a usurer, his goods were forfeited to the Crown and his lands to the lord of the fee. The statute 37 Henry VIII, ch. 9, entitled 'A bill against usury,' revised the former acts and laws, and is the foundation of all the statutes prohibiting usury from that day to this."

Hubbard, J., in Gray *vs.* Bennett, 3 Met. (Mass.), 522.

"Usury laws, however objectionable in principle, are admitted in the judicial discussions of the subject to rest upon such a traditional policy of the race, antedating the constitutions, as to make any question useless in the present state of public opinion."

Frederick N Judson: Address on "Liberty of Contract under the Police Power." Proceedings of Amer. Bar Assoc'n for 1891, p. 231.

8.

Since the preparation of the original brief in this case another decision has been added to the long list holding laws regulating the right of contract between employer and employé to be unconstitutional, of which, however, we have only the account contained in the telegraphic dispatches.

By a special dispatch to the New York *Commercial*, dated Albany, February 26, 1901, it is stated that the New York court of appeals has affirmed the judgment in the case of William J. Rogers against Controller Coler of New York, in which "Rogers sued to recover a balance due on a contract performed which the controller refused to pay on the ground that the contractor had not complied with the eight-hour law." One of the grounds on which the law is declared to be unconstitutional is thus stated in the dispatch:

"Because it invades rights of liberty and property, in that it denies to the city and the contractor the right to agree with their employés upon the measure of their compensation."

9.

In connection with the cases cited in our original brief, the attention of the court is respectfully called to the fact that the opinion of Circuit Judge Skinner, in the case of *Skinner vs. Garnett Gold Mining Co.*, 96 Fed. Rep., 735, that the California statute requiring corporations to pay their employés once a month in cash is constitutional, is based

largely on the fact that the California constitution provides that all laws concerning corporations "may be altered from time to time or repealed," and that the statute is hence a valid exercise of this reserved power of amendment. Judge Skinner in his opinion said:

"Under this provision the act of 1897 must be held as a legitimate exercise of the plenary powers of the legislature to modify, by general laws, within reasonable limits, the rights and privileges which corporations of the State possess as such, and this legislature may be justified upon the ground that the purposes of the State in creating corporations will be the better accomplished by such amendment" (p. 744).

The attention of the court is also called to the dissenting opinions of Judges English and Brandon in the case of *Peel Splint Co. vs. State*, 36 W. Va., 802, in which the constitutionality of the West Virginia scrip act was sustained by an evenly divided court. Judge Brandon, dissenting, said:

"The word 'liberty' does not mean simply exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, and to make lawful contracts therein to the ends of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness. The right to contract and be contracted with is indispensable to these indispensable objects. * * * It is a privilege essential to earn bread and secure happiness. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system, indeed under all civilized governments, than this right of contract. A man must have the right to exercise his skill and talents, and dispose of and use his labor and property, in lawful pursuits, as to him shall seem proper. * * *

"If, upon the suggestion of a supposed or real evil, always incident to the transaction of all business, the legislature can restrict lawful contracts in private business, government becomes not simply paternal but oppressive and tyrannical. The 'scrip act' would prevent the farmer, brick-maker or coal operator from giving to his hands for wages an order to any one for sugar, flour or meat—a great reversal in the right of contracts as used time out of mind."

10.

It is respectfully submitted, in conclusion, that no public necessity is shown to exist for the passage of the measure under consideration in this case, and none is shown in the testimony.

No employé is here complaining of hardship or oppression. None was introduced as a witness on the hearing of the cause. The proof furnishes not a scintilla of proof as to any public necessity for the passage of this act, any abuses requiring correction, or any employé dissatisfied with the order system.

Furthermore, no substantial reason for the passage of the act, no abuse requiring correction, is pointed out in the briefs for defendant in error.

It is true that in the brief for defendant in error, in the case of *Dayton Coal & Iron Co., Ltd., vs. Barton*, it is suggested that the act will have a "tendency to promote peace and to prevent bloodshed and strikes," but this assertion is wholly unsupported by the record, there being not a scintilla of proof, or even suggestion in the proof, that there has ever been any bloodshed or strikes on account of the order system, or that its abolition will in any degree affect these matters.

In the reply brief in this present case the entire argument or reason upon which the alleged necessity for this legislation is predicated is contained in the following sentence:

"It is necessary to the welfare of the employé, because it enables him to obtain the full amount of his wages without being compelled to take payment thereof in coal, which he cannot consume, or in coal orders, which he cannot convert into money except at a costly discount" (Reply Brief, p. 14).

This argument, based on supposed compulsion of the laborers, flies in the very teeth of the facts proven in this case.

As already cited, there is no compulsion or restraint whatever on the employés in this matter.

The uncontradicted testimony of the company's treasurer is that the company has a regular monthly pay-day, upon which each employé receives in cash his wages for the previous month, having, however, if he so desires, a weekly privilege of anticipating all wages for work to date in coal orders (Trans., p. 21); that these orders are issued at the market price of coal the same as charged to other customers (Trans., p. 22); that no employé is requested to draw these orders, the same being a voluntary act on their part (Trans., p. 21); that *about 25 per cent. of the employés never draw orders at all*, the remaining 75 per cent. of the employés drawing a varying amount of their wages in this way (Trans., p. 27); that on the average only about 50 per cent. of the total wages is paid through orders (Trans., p. 22) (inadvertently stated by the court of chancery appeals as 75 per cent.), *and that the highest-paid workmen, earning from* $45 *to* $175 *a month, draw more orders in proportion to the amount they make than any other laborers of the company* (Trans., p. 26).

The court of chancery appeals further found as a fact that the "orders are a convenience to the defendant's employés in the way of enabling them to realize on their wages before the regular pay-day and up to that pay-day" (Trans., p. 67).

It is respectfully submitted that on these facts no overruling necessity exists requiring legislative interference depriving employers and employed of the unimpaired right of free contract and virtually abrogating their right of contract by preventing them from contracting as they please and enforcing the contract, denying them the right, whether they will or no, to contract to give and accept in payment of wages an order payable in merchandise alone and not redeemable in money.

It is stated in the answer of the company that while by the acceptance of the orders by the employés "it is relieved from all liability to redeem the same in cash, yet it has never re-

fused, and is willing and ready to redeem the same in cash, provided the employé fails to negotiate the same and in good faith presents the same for redemption in person on a regular pay-day."

Answer, Trans., p. 18.

The treasurer of the company testifies as follows:

"Q. In case that your employés presented these orders on a regular pay-day, would you or would your company redeem them in cash?

"A. We would, if presented by the man who signed the order."

Trans., p. 22.

On cross-examination he further testifies:

"Q. I will ask you, Mr. Brown, whether or not you know of an instance where an employé took out these orders and afterwards presented them to your company himself on a regular pay-day to obtain the cash on them?

"A. No, sir; they have never been presented on pay-day.

"Q. Were any orders taken out by an employé ever presented on a regular pay-day and cash demanded on them that you know?

"A. No, sir.

"Q. If the orders were presented by an employé on a regular pay-day and the cash demanded, and the date of the order should show that it was for wages earned between the first of the month and the regular pay-day, would you pay the order in cash?

"A. No, sir."

Trans., p. 26.

The difference between the contract of the parties and the obligation sought to be imposed by the statute is thus that under the contract of the parties the order is redeemable in merchandise only, although the company is willing to redeem it in cash in the hands of the employé himself, if presented at the next pay-day *after* the expiration of the month

in which the wages accrued for which the order was issued, whereas under the statute it is made redeemable in cash, not only in the hands of the employé, but also of his assignee, and is furthermore made thus redeemable at the *first* regular pay-day, or at any time after thirty days.

Thus, if an order were issued on March 17th for the week's wages ending on that day, the company would decline to redeem it for cash, even in the hands of the employé, before the pay-day on April 20th, at which the cash wages would have been payable; but under the statute it would be redeemable in cash in the hands either of the employé or of an assignee on the first pay-day, namely, March 20th; so that in such case the statute would impose two additional obligations on the company in violation of the contract of the parties, (1) by requiring the redemption of the order in cash in the hands of an assignee as well as of the employé; and (2) by requiring it to be so redeemed one month in advance of the regular cash pay-day of the company. As a matter of fact, it would impose a third obligation not now in fact incurred by the company, though, as stated in its answer, it has no objection to it, namely, that of redeeming the order in cash in the hands of employé, no demand for such redemption being now in fact made.

As the matter now stands the issuance of the orders is a convenience to the employés which they voluntarily request and of which they now make no complaint. It is profitable to the company in increasing its sale of coal and enabling it to make a profit thereby, which unquestionably enables it to pay higher cash wages than it otherwise could, the profit on these coal orders being taken into consideration in fixing the cash rate of wages.

If the statute is held to be constitutional and enforceable its practical result will clearly be as follows:

In the first instance, the market price of coal orders will be increased to par, as they will be at once redeemable in cash at par, and a temporary increase of wages will be

brought about. In the second place, as the demand for their redemption will then, of course, be made in cash rather than in merchandise, almost all wages will be drawn in orders in order to get the earlier cash payments, and the company will be made to pay the large bulk, if not all, of its wages, not only in cash, but often a month earlier than they are now paid. There will then be an increased expense to the company and a positive loss resulting from the earlier payment of wages, with no corresponding benefit in profit on the orders, as at present. It is difficult to see how the company will then escape the necessity of discontinuing the issuance of the coal orders and going back to the system of a monthly cash pay-day.

This would have two results. In the first place, it would deprive the employés of the convenience arising from the anticipation of wages and would work great hardship to the families of the improvident. In the second place, as the company would lose the profit arising from orders which are taken into consideration in fixing the scale of wages, it would of necessity cause a readjustment in the scale of wages and a lowering of the cash rate, as the company, in the face of competition of other coal-fields and iron markets, could not do business successfully at a higher rate of wages; and so in the end the operation of economic laws and of the laws of demand and supply, which neither employer nor employé is able to withstand, would restore approximately the present status, and the *aggregate* wages be fixed again at the same rate as at present, with nothing accomplished after all, except that the laborer will be deprived of the convenience of anticipating his wages and a permanent blow will have been struck at the liberty of the individual and further encouragement given to the false hope that mere legislation is the sovereign panacea for social evils and economic troubles.

If such legislation is proper and constitutional, it is difficult to see where the line of demarcation shall be drawn,

where the halt shall be made, what private right shall be sacred from legislative interference.

While it is not denied that whenever the public welfare requires it, yet we respectfully submit that the public necessity should be imperative, the demand overruling, which should justify legislation making such serious inroads upon the liberty of the citizen, "the most essential personal right to human happiness," and going so far to foster in our people a spirit of dependence, rather than of independence, a habit of looking to politicians for relief, rather than to individual effort, and contravening that spirit of individual liberty which has been the life of the Common Law "from the Year Books down."

We again quote from Mr. Judson's address:

"As shown by Sir Henry Maine, in his 'Ancient Law' and other works, freedom of contract is unknown to primitive societies, but it is at once an incident and an evidence of a relatively highly advanced civilization. The progress from the old system of rights and duties dependent on a fixed status to a system of rights and duties arising from the free contract of the individual is a distinct social advance from one great landmark of jurisprudence to another. In a modern industrial state this freedom of industrial contract representing a long and toilsome progressive social development becomes essential in any rational conception of individual liberty."

Again:

"The vice of the so-called social legislation denying freedom of contract is that it deprives the individual of his 'personal rights' and subjects him to the only tyranny which, in this democratic age, is possible."

Is not the greatest danger of legislation of this character that it tends to a retrogression from a system of rights depending on contract to a system of rights depending on status?

If the individual be once deprived of his personal rights on the theory that it is for his own good, when once accustomed to legislative dependence, may the same power not deprive him of liberty altogether?

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Supplemental Note.

At the request of solicitors for the Dayton Coal and Iron Co., the attention of the court is called to the following testimony in the record in their case, being the testimony in reference to the non-redemption in cash of the store orders involved in that case.

The only witness on this point is the company's cashier, G. C. McKENZIE, who testified as follows on direct examination:

"Q. 11. I believe that you say that these orders are issued by the defendant against the time of the operatives and during the month before they receive their pay.

"A. Yes, sir.

"Q. 12. And you say that a debit is made against the account of the man to whom these orders are issued when they are issued to him?

"A. Yes, sir; a debit to his account of the amount issued.

"Q. 13. He is charged up with it as though it had been a direct liquidation of that much of their indebtedness to him?

"A. Yes, sir."

Trans., p. 12.

Again, on cross-examination, he testified as follows:

"Q. 29. Are these punch-outs ever redeemed in money in the hands of the payee or anybody else?

"A. No, sir."

Trans., p. 18.